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Summaries of Decisions

Volume 14 (1985)

Ontario

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS * - VOLUME 14

CITED 1985 14 C.R.A.T.

* This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired, application should be made to the Registrar.

Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario, 1980, Chapter 274, as amended.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

INDEX

SUMMARIES OF DECISIONS

VOLUME 14 (1985)

APPLICANTS OR REGISTRANTS — PAGE

Bailiffs Act

Acker, James Edward 1

Collection Agencies Act

Tryon, Gerald E. 35

Liquor Licence Act

Name of Establishment

Bordeaux Restaurant 37
Gigi's Café Restaurant 64
J.B.'s Corral II Restaurant 44
Katie's Roadhouse Restaurant 53
Pav Restaurant 73
Runnymede Village Restaurant 65
Viva T.O. Restaurant 79

Cross Reference Table

Licensee or Applicant

Bordeaux Restaurant Limited 37
(Bordeaux Restaurant)

Liquor Licence Act continued

Cross Reference Table continued

Licensee or Applicant continued

583021 Ontario Limited 44
(J.B.'s Corral II Restaurant)
575547 Ontario Limited 53
(Katie's Roadhouse Restaurant)
566469 Ontario Limited 64
(Gigi's Café Restaurant)
Foley, Derwyn F. A. 65
(Runnymede Village Restaurant)
(Christos Lampropoulos)
Lampropoulos, Christos 65
(Foley, Derwyn F. A.)
(Runnymede Village Restaurant)
McDaid, Carl, Enterprises Limited 73
(Pav Restaurant)
Valela, Salvatore 79
(Viva T.O. Restaurant)

Mortgage Brokers Act

First Federal Financial Services 80
(Upper Canada Credit Corporation)
Upper Canada Credit Corporation
(First Federal Financial Services) 80

Motor Vehicle Dealers Act

Barter, Robert L. 81
Burke, Paul R. 82
Craig, Edward William 84
(552484 Ontario Limited)
(Magnum Auto Sales)
552484 Ontario Limited 84
(Magnum Auto Sales)
(Craig, Edward William)

Motor Vehicle Dealers Act continued

Granger, David N. 88
   (Donald K. Lee)
   (Ridgeway Auto Sales)
Lee, Donald K. 88
   (Ridgeway Auto Sales)
   (Granger, David N.)
Leonard, David S. 96
Magnum Auto Sales 84
   (Craig, Edward William)
   (552484 Ontario Limited)
Ridgeway Auto Sales 88
   (Granger, David N.)
   (Lee, Donald K.)
Sunderland, Brian F. 98

Ontario New Home Warranties Plan Act

Belpark Homes Limited 102
Callegari, Luciano and Nicole 104
Carleton Condominium Corporation No. 177 106
Ciardullo, Joseph 108
Courtyard Homes Ltd 110
Edery, Kathryn 111
Hodges, Frank 112
Marmion Building Corporation 113
   (Tri-M Construction)
McPhee, Michael Lloyd 127
Muncic, Mr. and Mrs. Josip 129
Natale, Mr. and Mrs. Louis 132
Perkins Construction Ltd, G.H. 133
Rennick, Paul Henry 141
Rocco D'Agostino Homes Limited 145
Royal Trust Corporation of Canada 146
Saldanha, Patrick W. 150
Shapiro, Hyman 151
Siman, Andrew J. 153
Tri-M Construction 113
   (Marmion Building Corporation)
York Condominium Corporation No. 462 154
York Condominium Corporation No. 528 156

Real Estate and Business Brokers Act

Fawcett, Kenneth M. 177
Giannini, Giovanni 179
Harth, Rodney C. 181
Kodis, Peter 187
Walton, John Noel 192

Travel Industry Act

Travel Link Inc. 195

CUMULATIVE NOTES ON APPEALS FROM TRIBUNAL

TO SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Acker, James E. Appeal Proceeding	14 C.R.A.T.	1
Algoma Condominium Number One Harbour View (Sault Ste Marie) Ltd, the Appeal Proceeding	13 C.R.A.T.	165
Allendale Collection System (Jeremiah J. Rose) Appeal Withdrawn	11 C.R.A.T.	1
Amaral Restaurant (Licensees - Amaral, Manuel Antonio - Mrs. Aldina Maria Amaral) Appeal Withdrawn	3 L.L.A.T.	1
Arnold's (Licensees - 382844 Ontario Limited and 419748 Ontario Limited) Appeal Abandoned	6 L.L.A.T.	1
Baldassare, Antonio Appeal Dismissed	10 C.R.A.T.	23
Bannister's Tavern (Licensees - Phoenix, Barry - Peter McCallion - Terry Butt - Milton Avruskin - Donald Gardner) Appeal Dismissed	4 L.L.A.T.	5
Barn Steak House Tavern (Licensees - Kostas(Gus) Sorkos and Mrs. Victoria Cowderoy) Appeal Withdrawn	2 L.L.A.T.	52
Beacom, Bruce Appeal Abandoned	13 C.R.A.T.	182

Beef Baron Tavern (1980) (Licensee - Barletta, Domenico) Appeal Dismissed	3 L.L.A.T.	20
Beef Baron Tavern (1981) Appeal Settled	5 L.L.A.T.	1
Bertrand, Brent Appeal Abandoned	13 C.R.A.T.	184
Bluescooner Restaurant (Licensee - Bluescooner Ontario Limited) Appeal Withdrawn	3 L.L.A.T.	30
Bobby Rubino of Canada Limited Appeal Abandoned	12 C.R.A.T.	108
Bordeaux Restaurant (1980) (Licensee - Bordeaux Restaurant Limited) Appeal Dismissed	3 L.L.A.T.	36
Brandejs, Jan J. Appeal Dismissed	12 C.R.A.T.	232
Brenner, Richard G. Referred back to Tribunal	11 C.R.A.T.	37
Bril, Zenon Appeal Dismissed	10 C.R.A.T.	63
Carleton Condominium Corporation No. 111 Appeal Dismissed under Rule 61.12	13 C.R.A.T.	201
Catalano, Brenda and William Appeal Abandoned	11 C.R.A.T.	82
Cecil Tavern (Licensee - Joseph Cvetkovic and Ivan Cvetkovic) Appeal Dismissed	1 L.L.A.T	39
Commodore Motor Hotel (Licensee - Murphy Hotel Enterprises Ltd) Appeal Abandoned	6 L.L.A.T.	11

Coté, Beverley Appeal Abandoned	9 C.R.A.T.	30
Coventry-Graystone Properties Limited Appeal Abandoned	11 C.R.A.T.	85
Diplomat Tavern (Licensees - Steve Galiotos, Jim Procopos, and Jim Sotiropoulos) Appeal Withdrawn	1 L.L.A.T.	31
18 East Restaurant (Licensee - Dapratt Enterprises Inc.) Appeal Abandoned	6 L.L.A.T.	23
Gentile, Angelo Appeal Allowed on Consent	11 C.R.A.T.	155
Germeney, B.S. Appeal Abandoned	13 C.R.A.T.	205
Goheen Realty and Insurance Limited and Allan Raymond Goheen Appeal Dismissed under Rule 502	11 C.R.A.T.	158
Graystone Tavern (Licensee - Max Wiedemann) Appeal Dismissed	4 L.L.A.T.	40
Halton Condominium #41 Appeal Abandoned	11 C.R.A.T.	104
Hare, Leo Joseph Appeal Quashed	13 C.R.A.T.	266
Heath, Patricia Appeal Abandoned	13 C.R.A.T.	210
Herman Motor Sales, operating as Sunparlor Motor Sales Appeal Dismissed Reported 29 O.R. (2d) P.431	9 C.R.A.T.	7

Kehoe, Frank and Margaret Appeal Dismissed	8	C.R.A.T.	44
Kouyoumdjian, Haig Appeal Dismissed Cross Appeal Dismissed	11	C.R.A.T.	111
Kovacs, Tibor and Piroska Appeal Dismissed	8	C.R.A.T.	50
La Stella Restaurant (Licensee - Giuseppe Parentela) Appeal Dismissed Reported 33 O.R. (2d) P.836	4	L.L.A.T.	52
Lawson McKay Tours Limited Armstrong et al (32) Appeal dismissed	11	C.R.A.T.	212
Les Cavaliers Tavern (Licensee - Les Gars Restaurants Limited) Appeal Abandoned	5	L.L.A.T.	43
Loading Zone Restaurant, The (Licensee - Manfred Schroeter) Appeal Dismissed	4	L.L.A.T.	63
Lockwood, Bernard Bruce Appeal Abandoned	13	C.R.A.T.	213
MacMillan, Archie and Gloria Appeal Dismissed	9	C.R.A.T.	54
Marcenko, Harry Leroy and Doreen Appeal Dismissed	9	C.R.A.T.	58
McClocklin, Richard G. ("R - Cars") Appeal Allowed	12	C.R.A.T.	70
McDonagh and Palmerio Appeal Dismissed	8	C.R.A.T.	62

Nicolaides, Nicolas Appeal Proceeding	13 C.R.A.T.	99
Parkview Hotel (Licensee - Peter Cogan) Appeal Abandoned	5 L.L.A.T.	53
Professional Seminar Consultants Ltd -Associated Building Industry of Northern California Brown et al	11 C.R.A.T.	237
-Medical Society of Santa Barbara County Almklov et al	11 C.R.A.T.	240
-Alameda County Dental Society Crutcher et al Appeals Dismissed	11 C.R.A.T.	243
Rayner, Barry Appeal Abandoned	13 C.R.A.T.	233
Rodney's Restaurant (Licensee - Rodney's Restaurant Inc.) Appeal Dismissed	5 L.L.A.T.	66
Rose, Jeremiah J. (Allendale Collection System) Appeal Withdrawn	11 C.R.A.T.	1
Royal Trust Corporation of Canada Appeal Abandoned	14 C.R.A.T.	146
Rubino, Bobby, of Canada Limited Appeal Abandoned	12 C.R.A.T.	108
Sanga Tavern (Licensee - Sterio's Restaurants Limited) Appeal Dismissed	3 L.L.A.T.	110
Silber, Ruth and Cary Appeal Abandoned	12 C.R.A.T.	208
Smith, George Appeal Dismissed	11 C.R.A.T.	72

Spiffy's Restaurant 7 L.L.A.T. 19
(Licensee - 512310 Ontario Limited)
Appeal Dismissed

Stathakis, Steve 8 C.R.A.T. 74
Appeal Dismissed

Stephenson, James 10 C.R.A.T. 50
Appeal Dismissed

Stevens, Alfred 8 C.R.A.T. 1
Appeal Dismissed

Strand Holidays Limited 10 C.R.A.T. 156
-John P. Battista et al
Appeal Dismissed

Tramps Restaurant 13 C.R.A.T. 17
(Licensee - Rocco Di Giuseppe)
Appeal Proceeding

Upstairs Restaurant 4 L.L.A.T. 126
(Licensee - Hoehnder Restaurants Limited)
Appeal Dismissed

Vanckers Restaurant 13 C.R.A.T. 82
(Applicant - George Tatsiopoulos)
Appeal Abandoned

Wednesday's Child Restaurant 5 L.L.A.T. 78
(Licensee - 448124 Ontario Limited)
Appeal Dismissed

Wentworth Condominium No. 45 14 C.R.A.T. 204
Appeal Proceeding

Westminster Hotel 4 L.L.A.T. 131
(Licensee - Westminster Hotel Limited)
Appeal Allowed
Reported 33 O.R. (2d) P.312

Wheat Sheaves Tavern 2 L.L.A.T. 20
(Licensee - 331774 Ontario Limited)
Appeal Dismissed

York Condominium No. 340 Appeal Abandoned	10 C.R.A.T. 122
York Condominium No. 340 (2) Appeal Dismissed	11 C.R.A.T. 134
York Condominium No. 528 Appeal Proceeding	14 C.R.A.T. 156

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

CUMULATIVE INDEX

RULINGS

VOLUMES L.L.A.T. 5 to 7
C.R.A.T. 10 to 14

Bailiffs Act

			Page
Amalgamated Bailiffs Limited Eleftheriadis, George Smollett, Larry	Consent Order and Adjournment	11 C.R.A.T.	5
Dellelce, Nicholas	Consent Order	12 C.R.A.T.	1

Business Practices Act

C.K.W. Energy Corporation Ltd Carver, James Bruce Kolvek, Robert Edward Whipple, Kaye Don	Assurance of voluntary compliance	13 C.R.A.T.	1
Danforth Radio Company Limited (1/2 Price Video/Audio Wholesale Distributors Ltd)	Adjournment and Extension of time of expiration	12 C.R.A.T.	4
1/2 Price Video/Audio Wholesale Distributors Ltd		12 C.R.A.T.	4
Newbauer, William H. (United Financial Incentives, Inc.)	Extension of time of expiration	12 C.R.A.T.	12
Risman, Gilbert (1/2 Price Video/Audio Wholesale Distributors Ltd)		12 C.R.A.T.	4
United Financial Incentives, Inc. (William H. Newbauer)		12 C.R.A.T.	12

Liquor Licence Act

Name of Establishment			
Babbage's Restaurant	Temporary licence	13 C.R.A.T.	7
Bobby Jo's Restaurant	Adjournment	7 L.L.A.T.	40
Centennial College of Applied Arts & Technology	Meeting to decide status	5 L.L.A.T.	5
Chick 'N' Deli Restaurant	Meeting to decide status	5 L.L.A.T.	14
Country Place Tavern	LLBO decision a nullity	13 C.R.A.T.	61
Frank's Restaurant	Meeting to decide status	6 L.L.A.T.	29
Lake Abbey Tavern	Specification of parties	7 L.L.A.T.	26
Piccolo Castello Trattoria Restaurant	No jurisdiction	13 C.R.A.T.	75
Pros Restaurant now known as Ocean Queen Restaurant	No jurisdiction	13 C.R.A.T.	80
Restaurant L'Eventail	Meeting to decide status	5 L.L.A.T.	65
Royal Simcoe Lodge Tavern	Adjournment	7 L.L.A.T.	1
Tramps Restaurant	Adjournment and Consent Order	7 L.L.A.T.	14

Cross Reference Table

Licensee or Applicant		
Antonangeli, Angelo (Royal Simcoe Lodge Tavern)	7 L.L.A.T.	1
Colorbar Restaurant Incorporated (Babbage's Restaurant)	13 C.R.A.T.	7
Di Giuseppe, Rocco (Tramps Restaurant)	7 L.L.A.T.	14
Lake Abbey Hotel Inc. (Lake Abbey Tavern)	7 L.L.A.T.	26
Marrelli, Federico and Yolande (Country Place Tavern)	13 C.R.A.T.	61
North Nottawaga Beach Cottagers Association (Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75

Liquor Licence Act continued

Cross Reference Table continued

Licensee or Applicant continued

Nottawaga Creek Ratepayers Association (Piccolo Castello Trattoria Restaurant)	13	C.R.A.T.	75
Ouzounis, Vasillios (Pros Restaurant now known as Ocean Queen Restaurant)	13	C.R.A.T.	80
Piccolo Castello Trattoria Ltd (Burns Proudfoot) (Piccolo Castello Trattoria Restaurant)	13	C.R.A.T.	75
Proudfoot, Burns (Piccolo Castello Trattoria Restaurant)	13	C.R.A.T.	75
Scott, James (Piccolo Castello Trattoria Restaurant)	13	C.R.A.T.	75
Sharpe, Charles M. (Frank's Restaurant)	6	L.L.A.T.	29
Silver, Morris and Edith			
(Centennial College of Applied Arts and Technology)	5	L.L.A.T.	5
(Chick 'N' Deli Restaurant)	5	L.L.A.T.	14
(Restaurant L'Eventail)	5	L.L.A.T.	65
373857 Ontario Limited (Bobby Jo's Restaurant)	7	L.L.A.T.	40
Wahnekewening Beach Cottage Owners Association (Piccolo Castello Trattoria Restaurant)	13	C.R.A.T.	75

Mortgage Brokers Act

Haron Investments Inc., (Nicolaides, Nicolas) (Canadian Financial Services)	Notice of Further Particulars	12	C.R.A.T.	37
Security Mortgages Services -Silver et al	Record of agreement	11	C.R.A.T.	27

Motor Vehicle Dealers Act

Amato, Pietro (Pete's Auto Repairs)	Adjournment	11 C.R.A.T.	33
Ayton, Michael Valentine	Extension of time	10 C.R.A.T.	14
Baldassarre, Antonio	Application for an Order granting a Stay of the Decision and Order of the Commercial Registration Appeal Tribunal pending the disposition of the Appeal to the Supreme Court	10 C.R.A.T.	20
Baldassarre, Antonio	Objection to composition of Tribunal	10 C.R.A.T.	23
Barrette, Cyril	No Jurisdiction	12 C.R.A.T.	50
H & J Auto Centre Limited (Howard Dillon) (Town and Country Auto Centre)	Stay denied awaiting SCO action	13 C.R.A.T.	143
MacMillan, Donald Neil	Admissibility of information	11 C.R.A.T.	63
McClocklin, Richard Gary (operating as "R - cars")	Granting Stay	12 C.R.A.T.	69
Stephenson, James	Application for Stay	11 C.R.A.T.	76

Ontario New Home Warranties Plan Act

Abcon Limited	No jurisdiction	13 C.R.A.T.	160
Beacom, Bruce	Granting adjournment	12 C.R.A.T.	99
Bertrand, Brent	Granting adjournment	12 C.R.A.T.	102
Bobby Rubino of Canada Limited	Document examination	12 C.R.A.T.	106

Ontario New Home Warranties Plan Act continued

Boucher, Bernard and Mary	Granting application to inspect and examine premises	12 C.R.A.T. 113
Brenzel, S. J.	Extension of time	11 C.R.A.T. 81
Bradbury Construction Limited	Consent Order	13 C.R.A.T. 193
Carleton Condominium Corporation No. 111	Granting adjournment	13 C.R.A.T. 201
Coventry-Greystone Properties Limited	Extension of time	11 C.R.A.T. 85
Germeney, B.S.	Granting adjournment	12 C.R.A.T. 131
Halton Condominium Corporation No. 41	No entitlement to hearing	11 C.R.A.T. 104
Harrison, F.	Undertaking	13 C.R.A.T. 208
Heath, Patricia	Granting adjournment	12 C.R.A.T. 136
Jaye, Norman	Conciliation	11 C.R.A.T. 108
Lall, U.	Authority for Agent to act	12 C.R.A.T. 140
Lockwood, Bernard Bruce	Granting adjournment	12 C.R.A.T. 153
McEachern, Walter H. and Elizabeth K.	Direction	13 C.R.A.T. 219
Rayner, Barry,	Granting adjournment	12 C.R.A.T. 193
Robitaille, J.	Written notice of claim	12 C.R.A.T. 201
Scott, Vicki Lynn	Extension of time	10 C.R.A.T. 107
Wentworth Condominium No. 45	Claim after expiry date	14 C.R.A.T. 204
York Condominium No. 297	Not covered by Warranty	14 C.R.A.T. 216

Real Estate and Business Brokers Act

Brandejs, Jan J. (Joseph)	Request for Stay	12 C.R.A.T.	229
Brandejs, Jan J. (Joseph)	Recall of witness	12 C.R.A.T	230
Castle Keep Real Estate Limited -Robinson et al	Clarification	11 C.R.A.T.	146
Dani, Quemal Cam	Compliance with agreement	12 C.R.A.T.	240
Dani Realty Corporation Limited	Order of compliance	12 C.R.A.T.	240
Gentile, Angelo	Stay on consent	11 C.R.A.T.	154
Horhager, Andreas	Different panels	11 C.R.A.T.	187
Horhager, Andreas	Separate hearings	11 C.R.A.T.	187
Monteith, Newton, G.	Separate hearings	11 C.R.A.T.	193
Morrissey, Joseph A.	Consent Order	13 C.R.A.T.	291
O'Brien, Gregory J.	Consent Order	13 C.R.A.T.	294

Travel Industry Act

Adventure Tours	Point of Law	11 C.R.A.T.	197
Alitours Inc.	No entitlement	13 C.R.A.T.	301
Ashok Travel Limited	Request for adjournment	10 C.R.A.T.	143
Danni International Travel Agency Ltd	Adjournment and Order	12 C.R.A.T.	246
	Consent Order	12 C.R.A.T.	247
Douglas Travel (Starburst Holidays Inc.) (Traveler's Tree)	Consent Order	13 C.R.A.T.	361
Koehler, Susan, (operating as Lifestyle Travel)	Adjournment and Order	12 C.R.A.T.	252
Lawson McKay Tours	Refusal of affidavit evidence	11 C.R.A.T.	206

Travel Industry Act continued

Lawson McKay Tours continued				
- Clark et al	No jurisdiction	11	C.R.A.T.	209
- Lowes, Florence	No jurisdiction	11	C.R.A.T.	210
Lifestyle Travel (Susan Koehler)	Adjournment and Order	12	C.R.A.T.	252
Manila International Travel Agency Ltd	Suspension	13	C.R.A.T.	303
Manitoba Travel Association				
- Byron's et al	Procedure	11	C.R.A.T.	232
Professional Seminar Consultants				
- Associated Building Industry of Northern California Brown et al		11	C.R.A.T.	237
Professional Seminar Consultants				
- Associated Building Industry of Northern California Brown et al	Affidavit evidence	14	C.R.A.T.	199
- Medical Society of Santa Barbara County Almklov et al		11	C.R.A.T.	240
- Medical Society of Santa Barbara County Almklov et al		14	C.R.A.T.	199
- Alameda County Dental Society Crutcher et al		11	C.R.A.T.	243
- Alameda County Dental Society Crutcher et al	Affidavit evidence	14	C.R.A.T.	199
- Golden Gate Nurses Association Inc. Chappell et al	Multiple claims - Adjournment	11	C.R.A.T.	246
Starburst Holidays Inc. (Douglas Travel) (Traveler's Tree)	Consent Order	13	C.R.A.T.	361
Traveler's Tree (Douglas Travel) (Starburst Holidays Inc.)	Consent Order	13	C.R.A.T.	361

JAMES EDWARD ACKER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE COLLECTION AGENCIES ACT

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
DONALD KENNEDY, MEMBER

COUNSEL: STEPHEN O'BRIEN, representing the Appellant

A.N. MAJAINA, representing the Respondent

DATES OF HEARING: 17, 18, 19 October 1984
21, 22, 23, 24, 25 January 1985 Hamilton
28, 29, 30, 31 January, 5, 7 February 1985 Toronto

REASONS FOR DECISION AND ORDER

James Edward Acker, born in Annapolis County, Nova Scotia some 53 years ago, is a bailiff residing in Wentworth County where he has lived most of his adult life. In the opinion of the Tribunal, he has indulged in some questionable activities which have caused the Registrar (as well as the latter's staff) who is responsible for the regulation and administration of that industry a great deal of trouble and concern particularly the legal and investigative sections thereof who have been put to a great deal of work as the result of Mr. Acker's actions. There is, however, no doubt that he, too, has experienced great suffering and expense as the result of these, all of which may prove to have been an experience in learning for him as well as for those who may come to learn of this case. We may add that he seems to have certain enemies who impress us as being quite exceptionable characters.

Section 1(a) of the Bailiffs Act defines a bailiff as follows:

> (a) "Bailiff" means a person who acts, assists any person to act or holds himself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction;

Section 9 of the Act reads:

> Subject to section 10, the Registrar may revoke an appointment where the bailiff,
>
> (a) has not complied with this act or the regulations or the Costs of Distress Act; or
>
> (b) is, in the opinion of the Registrar, incompetent or without capacity to act responsibly as a bailiff.

Section 10 deals with the formalities of the Registrar's Notice of Proposal to revoke, as well as the right of a bailiff to a hearing before the Tribunal, and the powers of the Tribunal at such hearing, and so on.

It is interesting to note that the criteria for revocation set forth in Section 9 do not correspond precisely with the equivalent sections of the statutes governing other similarly regulated industries; this may in part be due to the fact that bailiffs are appointed by Order-in-Council of His Honour the Lieutenant Governor rather than registered in the manner of the other regulated industries; or there may be some other reason or it may be a mere coincidence.

Most, if not all the other statutes which govern the other similarly regulated industries, employ language such as this:

> An applicant is entitled to registration or renewal of registration except where,
>
> ....
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

The Tribunal's decision in this case must hinge upon the interpretation we place upon the critical words "in the opinion of the Registrar, incompetent or without capacity to act responsibly as a bailiff". And we regret, that in addressing ourselves to this task, we lack the guidance which might have been found in any previous decision upon the point either of this Tribunal or of the courts or of any submissions in argument from learned counsel for the respondent Registrar.

This means that we have been obliged to light our own way, so to speak, and in so doing we think it proper to explain how we have done this.

Firstly, as this is clearly an appeal from the Registrar's Proposal or from his decision explicit in the Proposal, the Tribunal has deemed itself competent to "substitute its opinion for that of the Registrar" - words omitted from section 9 but specifically included in the sister statutes which govern the similarly regulated industries. For unless the Tribunal has the ability to substitute its opinion for that of the Registrar then there could scarcely be any point or purpose in an appeal to it from the Registrar's decision. The Tribunal's opinion, upon which this decision is based, is that it does have authority to do so.

Secondly, what is meant by the words "incompetent" (to act as bailiff) or "without capacity to act responsibly" (emphasis added) "as a bailiff" are, in our opinion sufficiently elastic or indefinite as to require a statement as to what we take them to mean before we proceed further.

What is clear is that these words "incompetent" and "without capacity to act responsibly as a bailiff" are all the Registrar and the Tribunal have to go on with if we wish to get someone out of this industry upon good and sufficient reason (apart from the narrow scope of section (a) of Section 9). It seems also clear that the main reason the Commercial Registration Appeal Tribunal would want to revoke a bailiff's appointment would be that the Tribunal was satisfied that the bailiff was unfit to have it; "unfit", based on past events and present circumstances and largely with a view to the likelihood or probability of future happenings. One can say "incompetent and without capacity to act responsibly as a bailiff" means "unfit", and, in other words, "not a suitable person to be a bailiff".

Furthermore, to even better determine what the Legislature is driving at with this language, we should no doubt contemplate what are the criteria or essential prerequisites for a person who is fit to be a bailiff, viz. one who is competent and does have capacity to act responsibly in the performance of such an appointment. Surely these are twofold, both tangible and intangible, that is to say a good bailiff must have physical capacity to do a job including strength, health, vigour, and whatever plant and equipment he or she may need, plus common sense and a working knowledge of the Act and the conventions and methodology of the industry, including the Registrar's rules and policies, if any, all of which could be called professional expertise. And certainly also, a good bailiff must have good character and sound judgment including integrity, honesty, fidelity to his client or principal, the ability to resist any temptation to convert to his own use or purposes in any way whatsoever any property he seizes or sequesters in the course of his work. It has been said by one Hamilton-area Provincial Court Judge who had occasion to review the facts of this case that a bailiff is a kind of quasi-judicial person and while we would in some ways prefer the term "quasi-constable type" we think what was meant is that a good bailiff should be possessed of the same qualities, in appropriate measure, as we deem the prerequisites of any public functionary whose duties include the enforcement of the law. Above all, he or she must be honest and free from all or any taint of corruption. And if ever sullied with the stain or taint of corruption that must be publicly washed away, if that is possible, no matter how painful the process, or else, if adjudged permanently and incurably unfit, such bailiff must have his appointment withdrawn.

All in all, we think the language of the sister statutes is easier to work with but the foregoing reflects, in essence, the Tribunal's understanding and appreciation of the meaning of Section 9 of the Bailiff's Act against which it has assessed the evidence in this case and reached its decision.

Having stated the foregoing by way of preliminary explanation to our reasoning we turn to the Registrar's Notice of Proposal, which is dated February 7th, 1983, together with the lengthy addendum or postscript to it entitled "Registrar's Notice of Further Particulars and Allegations and Registrar's Notice Pursuant to the Statutory Powers Procedure Act" which is dated October 3rd, 1984 and entered as Exhibit 9. These two documents are meant to spell out the essence of the Registrar's case against this appointee. The Notice of Proposal reads as follows:

A. NOTICE OF PROPOSAL TO REVOKE APPOINTMENT

> WHEREAS James Edward Acker ("Acker") holds an appointment pursuant to the Bailiffs Act R.S.O. 1980, Chapter 37 (the "Act") to act as a bailiff in and for the Judicial District of Hamilton-Wentworth;
>
> AND WHEREAS Section 9 of the Act provides that subject to Section 10, the Registrar may revoke an appointment for the reasons set out in the said section;

AND WHEREAS Section 10(1) of the Act provides that where the Registrar proposes to revoke an appointment, he shall serve notice of his Proposal together with written reasons therefore on the bailiff;

AND WHEREAS in the Registrar's opinion, Acker is incompetent or without capacity to act responsibly as a bailiff and therefore proposes to revoke his appointment;

NOW THEREFORE TAKE NOTICE PURSUANT TO SECTION 10 OF THE ACT THAT THE REGISTRAR HEREBY PROPOSES TO REVOKE ACKER'S APPOINTMENT AS A BAILIFF.

B. REASONS FOR PROPOSING TO REVOKE APPOINTMENT

The Registrar is of the opinion that Acker is incompetent or without capacity to act responsibly as a bailiff for the following reasons:

1. It is alleged that during the period of May 1980 to January 1982, Acker acted fraudulently or without honesty and integrity in the sale of certain motor vehicles which had been repossessed by him on behalf of clients of this bailiff's business. The motor vehicles in question are as follows:

a)	1979 Buick Park Ave.	OVM 804
b)	1979 Chev Camaro	OMN 587
c)	1976 Pontiac Aster	JZU 458
d)	1977 Aspen	LND 642
e)	1975 Ford Elite	KND 941
f)	1973 Plymouth Satellite	NFX 212
g)	1977 Ford	AZZ 185
h)	1977 Buick Century	MXP 968
i)	1975 Fiat	KEW 009
j)	1977 Monte Carlo	NPE 680

2. It is alleged further that during the period of May 1980 to January 1982 Acker carried on business as a motor vehicle dealer without being registered as required by Section 3(1)(a) of the Motor Vehicle Dealers Act R.S.O. 1980, Chapter 299.

> 3. It is alleged further that during the period of January 1979 to January 1982, Acker failed to keep and maintain books of account as prescribed by Section 13(3) of the Bailiffs Act R.S.O. 1980, Chapter 37.

C. RIGHT TO HEARING [Particulars of appeal procedure - omitted.]

The Notice of Further Particulars, etc., being Exhibit 9, runs to some 13 pages which we have attempted to somewhat condense. After reciting the issuance of the above Notice of Proposal it continues:

> 4. Prosecution proceedings were commenced, respectively, under the Motor Vehicle Dealers Act...and the regulations made thereunder and under the Bailiffs Act.

[These were not criminal prosecution proceedings; they took place in the Provincial Offences court before a Justice of the Peace.]

> The charge or information in respect to these proceedings is reproduced hereunder:
>
> (1) James Edward Acker and Robert A. Steiner...during the period between May 15, 1980 and January 30, 1982, at the City of Hamilton, in the Judicial District of Hamilton-Wentworth and elsewhere in the Province of Ontario, unlawfully did carry on business as a motor vehicle dealer when they were not registered under the Motor Vehicle Delears Act, R.S.O. 1980, Chapter 299, contrary to section 3(1)(a) of the said Act and thereby committed an offence under section 22(1) of the Act.
>
> (2) James Edward Acker...between January 1, 1979 and January 15, 1982, at the City of Hamilton in the Judicial District of Hamilton-Wentworth and elsewhere in the Province of Ontario, unlawfully did, being a bailiff, fail to keep and maintain books of account in accordance with the accepted principles of double

entry bookkeeping, contrary to section 13(3) of the Bailiff's Act, R.S.O. 1980, Chapter 57 and thereby committed an offence under section 18(1) of the said Act.

5. The trial, before His Worship, D. Patterson, of the Provincial Offences court, in respect of Acker concerning the said two charges, lasted approximately 14 1/2 days. On conclusion of the trial, the learned Worship found Acker guilty on each of the said two charges and sentenced him to pay the maximum monetary fine of $2,000.00 under the said Motor Vehicle Dealers Act and a fine of $500.00 under the said Bailiffs Act, notwithstanding the absence of any previous conviction. Acker was further ordered to pay $2,000.00 within a period of six months and to pay $500.00 within a period of ninety days.

Steiner, however, pleaded guilty and was fined $500.00.

6. The Registrar is informed, and he believes and alleges that Acker's appeal from the conviction of the charge under the Bailiffs Act was dismissed and that Acker is seeking leave to appeal further from such dismissal.

The Registrar is further informed, and he believes and alleges, that Acker's appeal from the conviction of the charge under the Motor Vehicle Dealers Act is pending.

[The status of the matters referred in the above paragraph 6 remains unchanged as of the date of these Reasons].

7. In addition to the Notice of Proposal under the Bailiffs Act and prosecution proceedings, all as aforesaid, the Registrar of Motor Vehicle Dealers and Salesmen issued a Notice of Proposal on September 7, 1983. The Registrar thereby proposed to refuse to grant registration as a motor vehicle dealer to 544352 Ontario Limited, to carry on business as Centre Automotive Sales and Services, of which

Acker is the president and a director, and he also thereby proposed to refuse to grant registration to Acker to act as its salesman, all pursuant to the provisions of the said Motor Vehicle Dealers Act.

A hearing had been applied for by the said motor vehicle dealer and its salesman, Acker. The proceedings in connection with this matter, which is identical or similar in regard to the alleged issues or facts, to the said proceedings under the Bailiffs Act and prosecutions, are also pending.

TAKE FURTHER NOTICE THAT:

8. The Registrar incorporates the entire Notice of Proposal issued on February 7, 1983 under the Act, as if it is fully and expressly set out herein, and further alleged particulars supplemental thereto include the following:

FURTHER ALLEGED PARTICULARS

(1) Acker was appointed as a bailiff, effective September 15, 1977. He was informed accordingly by the Registrar's letter of September 17, 1977 which stated, in part, that "Attached is a letter of instructions to which you are asked to pay particular attention.".

The said "letter of instructions", in part, states the following:

> "....You are required to devote your full time to bailiff work and not be engaged in any other line of endeavour whatsoever except as authorized.
>
> "As a private bailiff you are neither a Peace Officer nor a Court official. Your powers are limited to acting as an agent for the creditor in the repossession of goods and chattels..."

The Registrar believes and alleges that Acker acted contrary to these instructions.

(2) Section 1(a) of the Act defines the bailiff as follows:

> "Bailiff" means a person who acts, assists any person to act or holds himself out as being available to act for or on behalf of any other person in the repossession or seizure of chattels or in any eviction.

The Registrar has been informed and, on such information, he believes and alleges that Acker did not restrict his activities merely to "the repossession or seizure of chattels or in any eviction", as provided in the said definition of a bailiff.

In this connection, the Registrar adopts and reproduces hereunder the registration status of Acker and Steiner and their activities, which are synopsized by one of the Ministry investigators.

[Here follows the following Synopsis of the registration status of Acker and Steiner including a "Synopsis of their activities". In the opinion of the Tribunal, the particulars set forth of the various registrations are essentially accurate but the particulars or allegations concerning their alleged activities will be subject to certain qualifying comment by the Tribunal, based on the evidence at the hearing, as these Reasons continue.]

SYNOPSIS

James Edward Acker was duly registered as a Motor Vehicle Dealer during the period 16th of June 1965 to 4th of April, 1977, and has not been so registered since that date.

He was appointed a Bailiff in and for the Judicial District of Hamilton-Wentworth, effective September 15, 1977. As a Bailiff he was required by his clients who were local lending institutions, banks, trust companies and credit unions, to repossess various items, but most repossessions were motor vehicles where the borrowers had not repaid as agreed.

In addition to his duties as a Bailiff, Acker also arranged for the storage of repossessions for the period of time required by law, and then obtained bids for the sale of these units from interested parties including local used car dealers. Unknown to the lenders he had made arrangements with at least two such used car dealers, Algonquin Mobiles and Hamilton Car Care Centre, operated by Adolph Lucchi, allowing him to buy and sell cars for his own benefit using their names, and putting the cars through their books in return for a fee Acker paid to them for this accommodation.

Acker holds the mortgage on the premises of one of these dealers, Adolph Lucchi.

The lender required a minimum of three bids on each repossession, and Acker did provide at least that number, but investigation has revealed that they were not sealed bids, and that he obtained them from friends or other people who were prepared to accommodate him for one reason or another.

The payment for these units purchased in the names of other dealers was made by Acker to the dealer at the same time as the dealers paid the lenders for the cars, so that the dealers did not have to tie up their own capital.

It should also be noted that he did buy some cars in his own name using a straight forward purchase procedure.

The repair work required on the cars, plus the safety standards certificates required to be issued, were all done by one or two repair garages known to Acker, primarily by

379365 Ontario Limited, operating as Centre Automotive Sales and Service, another firm where Acker holds a mortgage on the business premises. These people also provided bids on cars, but never actually bought any cars.

Cars were usually resold shortly after purchase, often at a wholesale level to other dealers, and virtually always at a good profit. Others were retailed to friends and customers who knew him to deal in cars.

This investigation has also revealed James Acker did not prior to February of 1982, maintain any ledgers or books relating to his operation as a Bailiff.

Robert A. Steiner was duly registered as a Motor Vehicle Salesman under the Motor Vehicle Dealers Act during the period March 10, 1967 to November 5, 1976, approximately, and during the period January 2, 1979 to March 3, 1980, but has not been so registered since that date. Some time in 1980 commencing at least in May of 1980, and continuing until April of 1982, he worked with James Acker repossessing, purchasing, and selling vehicles. He was not at that time registered as either a Motor Vehicle Salesman, or as a Bailiff.

(2) The Registrar also adopts and reproduces hereunder a chart or a spread-sheet, which had been prepared by the said Ministry Investigator and which gives further particulars of the motor vehicles mentioned and referred to in the said synopsis:

[Here follow three pages of a chart or spread-sheet prepared by the Ministry's Senior Investigator which gives further particulars as alleged by the Registrar in relation to 22 vehicle transactions including the ten mentioned in the Notice of Proposal. Included are the licence and serial numbers, make and model of each vehicle, as well as the identity of the original owner (the debtor from whom the seizure was made) and that of the lender or the lending institution on whose behalf the vehicle was seized. Also shown is the amount of the successful bid in each case, the source of the safety certificate, the name of the ultimate buyer and in at least half the cases, an allegation as to the identity of a person described as a "salesman" in such transaction, as well as some estimate of an amount of "profit" resulting therefrom.

[This chart is based on the research of the Registrar's Senior Investigator and the information is by way of allegation (much of which was not disputed) and in only 14 of the 22 cases is there any amount shown by way of alleged profit. These sums were disputed. It was admitted in the course of testimony that they were alleged to be "gross profit" only and subject to reduction or elimination by various marketing expenses such as the cost of repairs, safety standards, new tires, etc. The "gross profits" attributed in whole or in part to Acker were alleged to have totalled some $7,690.00 or 8,090.00 over a period of between 24-25 months between December 1979 and January 1982.]

The Registrar's Notice (Ex.9) continues as follows:

REGISTRAR'S FURTHER ALLEGATIONS

> (1) Acker did act contrary to the terms or conditions of his appointment as a bailiff, as stated in the Registrar's said letter of September 16, 1977, for the reason that (1) he did not devote his full time to bailiff work, (2) that he did engage in other lines of endeavour such as, the purchase or sale of motor vehicles, and (3) that he exceeded his powers which were limited to acting as an agent for the creditor in the repossession of goods and chattels; or
>
> (2) Acker did act contrary to the Act, for the reason that he did not restrict his activities as a bailiff merely to "repossession or seizure of chattels":, as provided in the said section 2(a) of the Act; or
>
> (3) In the Registrar's opinion, Acker had carried on his business as a bailiff in an incompetent and irresponsible manner,

within the meaning and contemplation of section 9(b) of the Act, for the reason that it was his duty, as an appointed belief [sic], to be thoroughly aware of the provisions of the Act and be seen to be acting in accordance therewith; or

(4) Acker did engage himself in a series of questionable transactions subsequent to the repossession or seizure of motor vehicles as exemplified by the said synopsis and the said charter or spread-sheet; or

(5) The Registrar considers that Acker did act in an incompetent or an irresponsible manner, for the reason that he did act in access [sic] of his authority as a bailiff, all as aforesaid, or for the further reason that he did not keep and maintain books of account in accordance with accepted principles of double-entry bookkeeping, as it was his duty under section 13(3) of the Act; or

(6) The Registrar considers that Acker, as an agent, failed or neglected to carry out one of the most basic duties, namely, to act in the best interest of his principals, primarily by making the fullest and true disclosure of all material facts; or

(7) Acker had been a registered motor vehicle dealer under the said Motor Vehicle Dealers Act for a number of years and he discontinued being a partner of Cut-Rate Motors on or before his appointment as a bailiff. He, however, continued operating as an unregistered motor vehicle dealer, all as aforesaid, and in so doing he used methods or he did engage himself in a course of conduct which are or is considered reprehensible or irresponsible.

Investigation disclosed further that Acker had a vested interest, either directly or indirectly, in the registered motor vehicle dealer's business of 379354 Ontario Limited, operating as Centre Auto Sales and Service, whose director, officer and a registered salesman was one Jurgen Emil Eisebrenner, and in the registered motor vehicle dealer's business of one Adolph Lucchi, operating as Hamilton Car Care Centre. Acker's said interest in these two registered dealerships was arranged, by Acker ostensibly loaning money to his wife, who invested it in mortgages to the said two dealerships.

Bids were placed by the said two dealerships on behalf of Acker, who was, thus, directly or indirectly, responsible for the submissions of the said bids, with the view to purchasing the motor vehicles repossessed by Acker. Acker, contrary to his fiduciary duties, did not disclose the significant factor of his vested interest in these two dealerships to his various principals.

Further, bids were submitted by another registered motor vehicle dealer, namely, 382016 Ontario Limited, operating as Algonquin Mobiles, one Ronald Oke, being one of its principals and, in this case also, Acker was responsible, directly or indirectly.

Not only did Acker fail or neglect to make total and true disclosure of all facts, including the fact of his said vested interest and of his purchase and subsequent sale of the various repossessed motor vehicles, but he made, as well, a secret profit, as exemplified by the synopsis and the said chart or spread-sheet, all contrary to fiduciary duties imposed on him by the law of agency.

The Registrar, therefore, believes and alleges that Acker set out to deceive or mislead, or that he did deceive or mislead, his various principals by misrepresentations or by non-disclosure of material facts. In

> the alternative, the Registrar believes and alleges that Acker knew or he ought to have known that his various principals would be deceived or misled thereby.
>
> (8) The Registrar, therefore, concludes that Acker did act in an incompetent manner or that he has demonstrated an absence of capacity to act responsibly, having regard to his authority and duties governing his appointment as a bailiff, within the meaning and contemplation of the said section 9(b).

The foregoing condensation of Exhibits 7 and 9 filed at this hearing provide, we trust, the gist of the Registrar's case and essential allegations of wrong-doing against the Appellant. After studying the great volume of documentary material exhibited including two transcripts of judicial decisions, and after hearing 24 witnesses during 14 days of public hearing, both in Toronto and in Hamilton, over a period of some three months, as well as many hours of review of the several hundreds of pages of notes we took and lengthy deliberations, the Tribunal has reached its own conclusion, which is a unanimous conclusion, as to what it may reasonably believe to have been the probable facts of this case. As well, it has reached conclusions concerning certain allegations it does not deem to have been sufficiently demonstrated or proven against the Appellant. The Tribunal's perception of the essential factual situation runs as follows:

James Edward Acker, born in Annapolis County, Nova Scotia, some 53 years ago, as aforesaid, came to Hamilton in 1950 when he would have been some 19 years of age. A couple of years later, when he was about 21, he took employment with The Hamilton Spectator as a compositor and he held that position, which, as he describes it, seems varied and quite interesting, for the next 23 years until 1980. Some time during that period he married, and presently has two children, a daughter who was 7 when he gave his evidence last January and a son aged 9. He lives with his family in a house which he built himself some distance out-of-town. At some point prior to his marriage he purchased a farm property located somewhere above the mountain near Hamilton which turned out to be a very good investment with the result (which is also probably due to industry and competence in business generally) that his net worth now stands at some $800,000 so that, whatever his other faults may be, he is not lacking in a degree of financial independence.

During his latter years with The Spectator, he displayed an evident interest in the subject of used cars, to the extent that he became registered as a motor vehicle dealer as a sideline. He remained duly registered from June 16, 1965 to April 4, 1977 (as stated by the Registrar) carrying on business (with a partner) under the name and style of "Cut Rate Auto Sales". There has not been the slightest evidence set before the Tribunal, either by Mr. Abrams, the Registrar of Motor Vehicle Dealers and Salesmen, who came to Hamilton to testify before us or by anyone else that that business, which was carried on in the vicinity of the City of Hamilton for almost 12 years, was in any way dishonest or anything less than strictly up and up.

However, we can at least make the observation that a man who is the co-proprietor of a motor vehicle dealership specializing in used cars over a period of 12 years, while at the same time working full time as a compositor for a local newspaper, does thereby demonstrate a considerable and even considerably greater than average interest in the subject of used cars. It could be said that whereas many people find the whole subject of used cars extremely boring, Mr. Acker evidently did not, indeed he must have been very interested in them. Perhaps this was a carry-over from adolesence. We do not know. But at all events he was clearly during these 12 years a man who was very interested in used cars, who must have spent a lot of time thinking about them and might even have been, so far as we know, fascinated by them. (But there is no evidence that this interest, at least during the 12 years of his registered dealership, was in any way an unwholesome interest or an improper one.)

On April 4th, 1977 Mr. Acker - still deriving his principal earned income from his full-time job at the Hamilton Spectator - got out of the automobile business and gave up his registration as a motor vehicle dealer. Later, on September 17, 1977 of that same year, he was appointed a bailiff in and for the district of Hamilton-Wentworth. We can draw no sinister conclusion upon the evidence or otherwise for this change of occupation. The factors that led to his giving up his co-proprietorship in the car business and his motor vehicle dealership registration, were, so far as we see it, completely innocuous. We don't know why he decided his next move after this should be to become a bailiff - probably, so far as we can see, because he simply fancied being a bailiff. A bailiff is largely his own boss; he can work more or less his own hours because the hours are flexible, and the work carries a certain dignity. Probably it struck him as a good occupation for some one of his age and circumstances. We might mention that Mr. Acker's background was investigated to some extent at this point and prior to his appointment and it was ascertained that he had no criminal convictions at any time against him, which remains to be the case at this time.

The method whereby a person becomes appointed a bailiff consists (or at least did in 1977) of obtaining a recommendation for appointment from the local Clerk of the Peace (who, at that time, in Hamilton, was the Crown Attorney) which recommendation is passed on to His or Her Honour the Lieutenant-Governor if the Clerk is satisfied as to the need for a bailiff or an additional bailiff and as to the applicant's fitness for appointment. The appointment extends to a specific county or district although supplementary appointments for nearby counties and districts are, in practice, often made. When Mr. Acker was appointed he received a letter (Exhibit 12) from the Registrar setting out certain guidelines which, in the Tribunal's opinion, was not as specific as it probably should have been. It stated that the appointee should apply himself full time to the occupation of bailiff and not engage in any other occupation; however it was implicit in the correspondence he had with the Registrar that he intended to remain (as he did for a couple of years) for some time with The Spectator and no particular objection had been made to that. The Registrar's instructions apparently reflected an expression of his policy, what he preferred the appointee to do or not to do, rather than the strict provisions of the statute or its regulations or any other law. The Tribunal is of the opinion that despite the fact that a person fit to be a bailiff should be a mature, sensible and responsible individual capable of conducting himself in accordance with those qualities to a high degree, it is nevertheless regrettable that the guidelines and the Act were not considerably more specific.

The work of a bailiff in a community such as Hamilton and its environs reflects the nature of the economy of that community and the life modes of its population, etc., and therefore, as things turned out, the bulk, perhaps over 80% of Acker's work involved the repossession of motor cars. He applied himself to this activity with what many of the witnesses stated and none denied was a high degree of proficiency and skill including tact and good judgment and, also, his charges were modest and he worked hard and efficiently for what he earned. His business quickly grew. It was inevitable that he brought with him to this activity the knowledge of cars, used cars, which he had acquired in his previous business occupation as well as the pronounced personal interest in used motor vehicles upon which we have commented above. Just as some people are interested in old books, others in musical instruments or antiques, Mr. Acker had and carried with him wherever he went this pronounced interest in cars. It was this quirk or bent of his which, together with other unfortunate circumstances, got him into deep trouble.

In the opinion of the Tribunal, the proper method of operation to be followed by a bailiff when he or she seizes or repossesses a motor vehicle, i.e. when he or she executes a seizure warrant, is to take possession of that chattel in a peaceable way - and it is the performance of that act which is the bailiff's principal function - and convey it to a secure garage or parking lot known as a compound. Except in the case of voluntary surrender, where the bailiff will have been given the keys by the chattel mortgagor and can drive it there, this was usually done by means of a tow-truck. (The important role of tow trucks and their operators will be mentioned later). Once the property is in the compound the seizure is perfected and in cases where the proper procedure is being followed the bailiff's function is finished: that is to say, his involvement with the property is and should be over.

But in some jurisdictions it seems the practice differs from this. And at the time Mr. Acker was practicing, from 1977 to the time he got into trouble, the bailiff's task was extended one or two steps.

The seized property having being deposited in the compound it must remain there for any statutory period within which the owner (chattel mortgagor) is entitled to make redemption. Sometimes, where the chattel mortgagee who has ordered the seizure (the bailiff's client) is particularly sensitive to public relations or to any kind of adverse publicity, which is very much the case with large national institutions such as trust and loan companies and the chartered banks, the redemption period or period of grace will be extended most generously up to 30 days or more. What happens then is that the chattel mortgagor in possession will recover the amount owing by selling the property. This operation is also the subject of the most fastidious procedural nicety, i.e., where the national institutions are the clients, and for the same reasons, reasons of public relations, because experience has shown that repossession is often a matter of high emotional involvement and cases have been known where children of tender years, the offspring of debtor parents, have been traumatized and so charged with resentment towards the banks or other creditors that they have carried bitterness throughout their whole ensuing lives. This is bad for business and so the rule followed by corporate lenders today is "get the money back - but be fair and above all be perceived as being nice". Consequently, only nice people are permitted to do this work and, while extremely efficient, they do it in a very nice way. Or, better still, and whenever possible, they get someone else to do it.

And so it came about, in the locality we are considering, that a practice developed where the bailiff who had seized the property - and here we are talking of repossessed motor cars - was then invited or encouraged or otherwise permitted to preside over the disposal of them; as though this were part and parcel of his function, considering which, most people, including debtors, are rather vague to start with. The advantage of this method from the standpoint of institutional creditors is fairly clear. If "preside" is somewhat excessive a description of the bailiff's extended role in the sensitive disposal operation we may say that the bailiff was permitted to play a helpful role, giving further assistance to the creditors or mortgagees in possession in what we may call their distressing task. This was to arrange for the calling, collecting and delivering to the creditor institutions of tenders for the purchase of the vehicles to be resold.

The precise methods varied from time to time and from one repossessing institution to another - we shall not delve into the minute particulars. However, the practice which became widespread was more or less that notices, giving particulars of the repossessed vehicles, would be posted by the bailiff at the compound and by means of these, interested parties - dealers or private persons (sometimes friends of the debtors who had previously owned the cars) and others - would be invited to submit bids. We understand that frequently the bailiff would convey these to the creditor institutions although they may just as possibly have been submitted directly in other cases. Seemingly the practice varied. But the point is that a basically improper practice developed where the bailiff or bailiffs were getting involved in the disposal side of the debt-recovery business to an extent which went beyond what was proper or expedient.

Whose fault this was is not clear. In the Tribunal's opinion the banks and other lending institutions involved cannot escape some criticism. Their role was apparently rather passive; if they did the wrong thing it was more by omission than commission we believe. But large banks and loan companies are meant to be presided over, we assume, by knowledgeable people, and so if Mr. Acker went off the rails because of some imperfection(s) in the systems followed by his institutional corporate clients then we will not say he was wholly to blame. We note for the record at this point that testimony was set before us that the practices of at least one bank have now been reformed and we understand that other banks are following suit so that in future the bailiff's function will be strictly limited to repossession and conveyance to the pound after which auctioneers will be employed in respect of those matters concerning the disposal of the vehicles where Mr. Acker came to grief. Yet during the period from the commencement of his practice as a bailiff until the time of his downfall (i.e. when he was charged, brought before a Justice of the Peace for the consumer offences mentioned in the Proposal, and convicted) Mr. Acker was exposed to the temptations inherent in this wrong-headed practice then prevalent of bailiffs being involved in the disposal of the cars they had seized.

The Tribunal has heard and studied the evidence and we have set out above the essential particulars and allegations of the Registrar's case against him. These concerned some 22 cars variously dealt with over a two year period. We find that some of these dealings were wholly innocent; and that in other cases such dealings may partly or entirely have been by another person without his being responsible for them, i.e. by Robert Steiner about whom we shall have more to say below. But we are bound to conclude that in at least some of the transactions which the Registrar has called into question Mr. Acker did, in fact, contrive to influence the manner in which a repossessed vehicle was disposed of. This practice, which can be called "bid-rigging", was very wrong and we are unanimous and emphatic in our view that Mr. Acker, who had been vested with the honour of an appointment by the Lieutenant Governor in Council, disgraced himself and the bailiff's calling in so doing. Also that he should be subjected to severe and exemplary sanction.

However, there are a number of mitigating factors which fairness must take into account when we contemplate the position to which this Appellant has been reduced over 2 years after the charges were laid. At the conclusion of a 14 1/2 day trial before a Justice of a Peace in Provincial Offences court - a Court which hears charges under Consumer Protection legislation involving irregular business practices and so on but which is not a Criminal Court - he was found to have failed to keep and maintain books of account in accordance with the accepted principles of double entry bookkeeping, contrary to Section 13(3) of the Bailiffs Act thereby committing an offence under Section 18(1) of the said Act. He was also convicted of an offence under Section 22(1) of the

Motor Vehicle Dealer's Act in conjunction with Robert Steiner, namely, unlawfully having carried on business contrary to Section 3(1)(a) of the Act. He was fined a total $2,500.00, $2000.00 under the said Motor Vehicle Dealer's Act and $500.00 under the Bailiffs Act. He was also faced with the costs of a 14 1/2 day trial and of a 3 day appeal from the Bailiffs Act Conviction (which was not successful but in respect of which he has currently launched a motion for leave to further appeal. He is also currently appealing his conviction under the Motor Vehicle Dealers Act.) It may be said, therefore, that he has sustained the very real punishment of tens of thousands of dollars of outlay in legal costs, not only in the courts but resulting as well from his 14 day hearing before this Tribunal; costs, we must observe, which would not have occurred had he pleaded guilty in the Provincial Offences court (as did his former employee and co-accused) or had he aquiesced in the Registrar's proposal to revoke his appointment. He also suffered the disgrace and public humiliation consequent upon these convictions and further financial loss from the loss of business he has sustained; indeed his business, which at one time yielded an income of some $36,000 a year is now virtually in ruins. Yet he has launched these appeals and fought like a tiger to retain his appointment. In view of the evidence, which the Tribunal is inclined to accept, that his charges for the bailiff services he rendered were always extremely reasonable, and of the evidence of his general financial circumstances, we do not believe that his efforts to retain his appointment are entirely financially motivated and we think what he may be primarily endeavouring to do in the great struggle he has put up to retain his appointment is to clear his good name and reputation in the community. This we find an honourable motive, bespeaking considerable good in this man and in accordance with the evidence of the character witnesses who appeared. And we note that few if any of the witnesses who gave evidence at the hearing and who were questioned concerning his good character and competence as a bailiff had other than good to say of him. We are excepting Messrs. Steiner and Park to whom we shall be making further reference below.

The Tribunal is not convinced that such of the 22 allegedly improper motor vehicle transactions as were, in our opinion, in fact improper and the proper subject of severe and exemplary sanction as mentioned above, were, however, characterized by the full measure of evil depravity which we would be obliged to find in order to fully sustain the allegation set out in the first paragraph of the Registrar's Reasons for Proposal to Revoke Appointment at page 1 of Exhibit 7, to wit, that "during the period of May 1980 to January 1982 Acker acted fraudulently or without honesty or integrity" in the sale of such vehicles . The word "fraud" and the whole concept it denotes are far from simple as the following definition extracted from Mozley and Whiteley's Law Dictionary, 7th Edition, suggests:

> Fraud. The modes of fraud are infinite, and it has been said that the courts have never laid down what shall consititute fraud, or any general rule, beyond which they will not go in giving equitable relief on the ground of fraud. Fraud is, however, usually divided into two large classes, actual fraud and constructive fraud.
>
> An actual fraud may be defined to be something said, done or omitted by a person with the design of perpetrating what he must have known to be a positive fraud.
>
> Constructive frauds are acts, statements or omissions which operate as virtual frauds on individuals or which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design; as, for instance, bonds and agreements entered into as a reward for using influence over another, to conduce him to make a will for the benefit of the obligor. For such contracts encourage a spirit of artifice and scheming and tend to deceive and injure others.

Our thinking in this regard dwells on two areas of consideration - motive and consequence. As we were reminded by learned counsel for the Respondent Registrar, the criminal law concept of "mens rea" or guilty intention is not a prerequisite for a finding that an appointee's conduct has demonstrated unfitness to continue in the industry. The Respondent was under no onus to prove nor the Appellant to specifically disprove dishonest intention and, indeed, the Tribunal accepts tne latter's intention was not honest in respect to the bid rigging which we have determined took place. We deplore this. But at the top of page 6 of Exhibit 9, the Registrar's Notice of Further Particular's, it is alleged that "cars were usually resold shortly after purchase...and virtually always at a good profit". During the 14 days of the hearing the Respondent failed to prove this to our satisfaction. What seemed more probable was that the profits were modest or that there weren't any. According to the spread sheets contained in Exhibit 9, the gross profit imputed in whole or in part to Acker seems to have been somewhere in the 5 to 6 thousand dollar area and this was in respect to all the transactions complained of. But the Respondent admitted that safety standard Certificates were issued and at the modest price of $25.00 each (which is what Mr. Acker's preferred mechanic - who appears to be a most excellent mechanic - charged, in contrast to a fee of 3 or 4 times that amount usually charged in Toronto). For 22 cars he bought, the profit figure would thus be reduced. And again it was alleged that between $75 and $100 was paid in each case to a registered car dealer in an attempt to legitimize each transaction thus again reducing the net profits before even beginning to account for the repairs which we are convinced were in fact made and receipts were produced for most of these, as well as the new tires which Mr. Acker said he supplied in many cases before being able to resell because of the requirements of the safety standard Certificates.

Consequently we doubt that Mr. Acker made "good profits" on these transactions. Moreover we are convinced by the evidence that his motive in getting involved at all was to accommodate friends and acquaintances whom he knew in and around the areas where he lived and worked. One can peruse the list of buyers and it is possible in almost every case to readily perceive some connection between the buyer and Mr. Acker. For example, Mr. Walton who bought a car from or through Acker worked at the Ontario Government office where motor vehicle ownership transfers were registered. Mr. Acker had known him for a long time, going back to his days as a registered dealer. This gentleman, a government functionary, apparently thought Mr. Acker had access, as a bailiff, to good repossessed cars and could get him one at a good price. More importantly, he must also have thought that Acker was an honest man and that the car he bought through Acker would be a good one and worth what he would be paying for it, something one can't always be certain of with the average used car dealer whether registered or not. So Mr. Acker "arranged" or made sure that the car Mr. Walton wanted was obtained for him. To do this he practiced what must be called bid-rigging. But the winning bid, - the winning rigged bid if you will - according to the testimony of Steiner, Acker's enemy, was based on the "black book" which is an annually published compendium of used car values - sometimes called the car dealer's bible; in other words, it was based on a very reasonable assessment of value to be found in a semi-official book and not wildly out of line with true value. We note, too, the testimony of the officials of some of the lending institutions involved in the case that they would accept the highest bid only if it was in line with the figure which they looked up in the black book, not perceptibly less then fair market value as so determined. So the basis of acceptance of the winning bid was also in accordance with fair market value as per the book. It was not automatic so as to make it likely that any car would go for an amount really substantially less than it was worth. We believe that the essence of the "rigging" of bids was that it was done not to obtain undue profit for Acker by fraud as alleged, but to ensure that a "good" car was obtained for one of Acker's acquaintances. So far as we can see, this was the pattern in each of the "rigged" transactions - the party being accommodated by Acker was someone whom he knew or who was related to someone he knew, e.g. - his furnace man; his mechanic's secretary or her sister; a lady in the Canada Permanent office credit department; a manager of a credit union and, later, the latter's father, and so on. In the Tribunal's opinion, profit was not the motive. The motive was a desire to accommodate people; perhaps, also, a desire to look important. We note also that the impugned transactions - 22 in all and not all proven - were a small proportion of the volume of vehicles which passed through Acker's hands as a bailiff. In 1982, for example, he seized 228 vehicles in all, as well as other items of chattel property. The bulk of all these repossessions are free from any imputation of wrong of any kind. In summation, we don't believe that Mr. Acker intended through what he did, as much as we disapprove of it, to improperly enrich himself. What he did, in our belief, was done through a misguided desire to help his acquaintances and quite possibly to raise his status or his importance in their eyes. The motive was perhaps faintly pathetic, but not monstrous. As indicated above, we think the main reason people were keen to deal with Acker was that they trusted him and knew that his "repos" (repossessed cars) were likely to be good cars - something not all used car dealers can always be trusted to provide.

(We might also mention that "bid rigging" in these circumstances is an entirely different kind of misconduct from what the term means in the context of, say, the construction industry - especially, for example, construction contracts or harbour dredging contracts, involving government agencies and huge sums of money and corruption on a grand scale. This difference would be like the difference between benign and malignant tumors.)

Whom did he hurt? The principal concern of this Tribunal is the protection of the consuming public and we perceive three kinds of consumers in a case such as this.

These are, first, the consumer whose debt-encumbered property is seized. Persons in this class, who are certainly never in any circumstances to be disparaged or belittled because they may have experienced financial adversity, something which can result from illness or job loss or any kind of bad luck, things to which we are all susceptible, are entitled to fair play. When their goods are repossessed they are entitled to be fully credited with any surplus (overage) over and above the amount of the debt and the proper costs of the repossession process. Also they are entitled to the assurance that their goods, if they must be sold because they are unable to redeem them after repossession, will be sold at a fair price, i.e. that fair market value obtained in an open market will be realized so that any deficiency between the sum thus realized and the amount owing (such deficiency thereby to remain owing by them to the creditor) will be the minimum possible amount fairly determined. This is in the interests of the second category of consumer in a case like this, the client who hires the bailiff because, as principal in the seizure transaction, his reputation and ultimately his liability under law are at stake. Finally, where the goods are resold, the resale buyer is of course a consumer with an interest to protect.

Of these three categories of consumers, there has been no evidence of any loss or claim for loss in connection with the first. One assumes that if Mr. Acker made a car available to, say, Mr. Walton, at "a very good price", that Walton's gain would be the original owner's loss. There has been no evidence of any loss sustained by any of the original owners however. We cannot find that this happened. This is not to "whitewash" Mr. Acker. Perhaps the institutions who hired him absorbed any such losses. Having repossessed someone's car and liquidated it, it would not be easy or very much fun to then go after that person for a $100 deficiency nor would it enhance one's company's public image. Or perhaps the lending institutions never accepted any bid that would have left a large deficiency or resulted in a substantial shortfall. The institutions used the "black book" and so did Mr. Acker. We suspect that if the debtors sustained any losses they related to some minor amounts of "overage" which would otherwise have been refunded to them. But such losses are only hypothetical in this case. There is no scrap of evidence to prove a single one.

Similarly, there is no evidence that the lending institutions who were Mr. Acker's clients sustained any financial losses, at least due to Acker. They didn't have to. They may have lost or felt that they lost something by way of their public standing when Mr. Acker got into trouble and fell from grace.

Finally, who among Mr. Acker's purchasers were hurt or cheated or felt they had been given less then full or fair value for their money? Most were satisfied. Several, a minority of the purchasers of the used vehicles, were disappointed with the way these vehicles held up or performed over the ensuing years or months after their acquisition of them, but none attempted to blame Mr. Acker with one exception, Mr. and Mrs. Head.

Mrs. Head worked for The Permanent, in that Department which would be in contact with the bailiff. Apparently the Heads learned that Acker could get them a good repossessed used car as he had done for others and were keen to make use of this opportunity. Mrs. Head later said Acker misrepresented the odometer reading, stating the mileage was much lower than it was. Acker says the odometer was broken and that he informed her of this. In point of fact she signed her name to a Bill of Sale on which the true or higher mileage (in kilometres) was shown and that document was set before us in evidence. What further proof could be required that she knew perfectly well what the true figure was? And yet, later on, when the "cam shaft" came to be broken, the Heads went to General Motors and persuaded that Company to replace the same upon a special arrangement whereby G.M. supplied the parts free and the Heads paid only for the labour of installing them - this exceptional concession was made by G.M. on the basis of the representation made to them by the Heads that the mileage was low. Therefore, for the Heads to have admitted that they had known from the moment Mrs. Head signed the Bill of Sale showing the true mileage which was different from that shown on the broken instrument, would have been tantamount to an admission that they had knowingly defrauded G.M. of the value of the parts the Company supplied on the erroneous assumption that the lower mileage referred to was accurate. The Tribunal is of the opinion that the testimony of Mrs. Head that she was cheated by Acker in respect of this point is unreliable in that she and her husband had taken advantage of the inaccurate odometer reading and had a substantial motive in sticking to the story that Acker had made misrepresentation to them in order to avoid any possible claim against them for having obtained goods, to wit, automotive parts, through fraud and misrepresentation from G.M. Also, based on the testimony we heard from the latter, we believe that the person who put the idea into Mrs. Head's head that she had been cheated by Mr. Acker was Robert Steiner.

Which brings us to an extremely distasteful aspect of this case which cannot go without comment.

Acker's co-accused in the charge under the Motor Vehicle Dealer's Act at the Provincial Offences court was a man called Robert Steiner, who pleaded guilty to the charges which we think somewhat compromised Mr. Acker's defence. He was fined $1,000.00 on two counts upon a Motor Vehicle Dealer's Act conviction and Acker $2,000.00 because the Justice of the Peace said if the employee was fined the employer should be fined more.

It seems that in 1980, shortly before leaving The Hamilton Spectator, Mr. Acker, who is a middle aged man of medium build, injured his knee against a heavy desk with the result that he had to be hospitalized and underwent one or more operations for the removal of cartilage and so forth. He was incapacitated and for a long time was obliged to go about on crutches. But while he was in hospital he received a visitor. This was a clergyman, the minister of the church attended by his wife and children and who happened to be a highly successful minister whom we were told had accumulated a great deal of money. This visit, in terms of its result, appears to have been rather the opposite to a blessing for the invalid because the reverend gentleman had a brother-in-law, an ex-professional football star who had played, in his better days, for the Ti-Cats of Hamilton, who was in need of employment and who seemed just the man to help a bailiff on crutches with his heavier tasks such as vehicle repossessions, especially the difficult ones. Whether the minister mentioned that his brother-in-law Robert Steiner, born March 6th, 1946 was also a drunk and a bully, having been convicted of numerous criminal charges of impaired driving and common assault we don't know.

Acker decided to give the minister's brother-in-law a chance and thus began a relationship which precipitated or at least catalyzed Mr. Acker's close brush with professional ruin.

Mr. Steiner went to work with Acker, which was entirely wrong on the part of both men because he had no appointment as a bailiff or assistant bailiff and, indeed, was no doubt ineligible to receive one because of his substantial criminal record.

Somehow Steiner found out about Acker's bid-rigging deeds and soon got involved in the practice for the benefit of his friends as well. For example, he saw to it that his wife's piano teacher obtained a suitable car at a fair price. Two or three of the transactions referred to in Exhibit 9 are alleged to have been Steiner's deeds and not Acker's. Steiner helped

Acker with repossessions and proved quite helpful and the two men went drinking. It seems that the younger, bigger man, had a greater tolerance for alcohol and Acker got "polluted" on one occasion. Acker gave Steiner a key to his office and the latter soon got into the habit of arriving early and opening Acker's mail and if there was a warrant for a repossession, say for CIBC, he would go out and execute the warrant without informing his employer; at least that was the gist of Mr. Acker's evidence. Before long Acker was getting telephone calls, for example, from a lawyer whose client's car had been repossessed in Acker's name by Steiner with threats of physical violence and assault. Mrs. Acker took a dim view of Steiner because she feared he was leading her husband into a drinking habit. In short, both Ackers soon decided Steiner had to go. But it seems he was not an easy man to fire. However, with trepidation, Mr. Acker eventually told Steiner that he had no further need for his services, making a pretext that he was bringing his wife into a more active role in the business and Steiner's employment was terminated.

Acker's worst fears were realized for Steiner proceeded to demonstrate a malevolence, a persistent, and long lasting, spiteful determination to punish his ex-employer for firing him for which the average person's experience could scarcely find any parallel.

It seems that Steiner next attached himself to a Mr. Lorne Park, a competitor of Acker's.

Mr. Lorne Park, who appeared as a witness for the Respondent, struck us as a strange man. He entered the bailiff industry in 1979 or 80 as a "part time" bailiff while retaining his position with Stelco (in order to maintain an assured income) while "building up" his business as a bailiff. This part time arrangement was limited to a period of five years at the end of which, according to the condition imposed by the Registrar, Mr. Stoddart (whom Mr. Park referred to from the witness box as "Bill"), Mr. Park would be expected to have built up his business sufficiently that he would be able to make it his full time employment.

It has been suggested (by counsel for the Appellant) and we think with considerable possibility or even probability of accuracy, that Mr. Park did what he did, that is, reported the allegations which he had received through Mr. Steiner to the Hamilton-Wentworth Police (and we understand from what he told us that he had to go to the police station three times, each time spending several hours before the police agreed to forward his complaint to the Registrar) from less than honourable motives including that of eliminating a competitor. He himself described Steiner's feelings towards Acker as "bitter, angry" to which we assume could be added "vengeful". We are not under the illusion that informers and vicious rivals are not without their uses to the police in their work but we found the testimony of Mr. Park very exceptional just the same.

Mr. Park testified that he received "certain documentation" from Steiner which, after he had studied it, convinced him that Acker was a wrong-doer, probably a bid-rigger, which impelled him to go to the police. He also testified that he was, at this time, very much afraid that Steiner, in furnishing this information to him, was trying to "set him up" or as he put it, i.e., as he explained that term to the Tribunal, to get him, Park, into trouble. In other words what Mr. Park made abundantly clear to the Tribunal was that he himself did not trust Steiner at all and was afraid that he was not only a liar but a dangerous liar likely to get him, Park, into trouble as well as Acker. So he felt great trepidation he told us, but, despite that, in order to get the matter "off his shoulders", as he put it, he went to the police.

Was he seeking protection for himself from the police from Steiner? Or was he in some way being intimidated by Steiner and thereby forced or "sandbagged" by Steiner to report Acker to the police? Or is it possible that Mr. Park's motive in doing what he did was simply the elimination of an efficient competitor and to the extent that he and Steiner co-operated to bring this about, could their relationship together be spoken of as a conspiracy to deprive Mr. Acker of his appointment as a bailiff for the purpose of enhancing Mr. Park's business and providing Steiner with revenge?

Sometimes motive may be inferred from result. It is true, as counsel for the Appellant pointed out, that Mr. Park did resign from Stelco and become a full-time bailiff within a short time of Mr. Acker's being charged by the Registrar in the Provincial Offences court. He gave up his Stelco job and went full-time into bailiff practice a year ahead of the schedule he had worked out with Mr. Bill Stoddart. Also, there can be no doubt that Mr. Acker's business all but evaporated after the charges were laid; surely this business had to go somewhere else and can we doubt that Mr. Park, a new entrant into the field, was a beneficiary of that redistribution?

Let us at this point consider the evidence of Mr. M. McAllister, a tow-truck operator, a man of very frank and open countenance and demeanor, whose honesty and candor, so far as we are able to perceive such qualities, were quite transparent. That evidence is encapsulated in a letter of his own composition which he put in under oath and swore was signed by himself and his son, Larry, in his presence. This letter speaks for itself, as follows:

> Bennett's & Tiny's Towing
> 613 Dundas Street West
> Hamilton, Ontario
> L9J 1A2
>
> This is my voluntary statement:
>
> On the evening of January 5th, 1982 at 7 p.m. Robert Steiner, Gary McNeil and James D. Lorne Park (Bailiff) came to my place of business, known as Bennett's & Tiny Towing, No. 5 Highway, Waterdown. They told me that they were out to cause James Acker to loose [sic] his Bailiff license at any cost. They informed me that James D. Lorne Park (Bailiff) was going to become big and powerful as a bailiff and they would give me all of their towing and storage if I would help them to get something on James Acker so that he would loose [sic] his Bailiff License. I told them that James Acker was always honest with me and I knew of nothing that he had done that was wrong. I also told them that I had no intentions of having anything to do with any wrong doing against James Acker, or anyone else. And I then went on to tell them if they need my services as towing or storage that I would be happy to oblige at anytime. After a few moments of silence they got up from their chairs, thanked me and left quietly, and I am still waiting to hear from them for all of that towing and storage that they talked about. My son Larry and myself were both present all the time they were talking.
>
> September 7, 1982
> "M. McAllister"
> signature
>
> September 7, 1982
> "L. McAllister"
> signature

The Tribunal accepts the contents of this letter as true, mainly because we consider Mr. McAllister a decent, truthful man and substantially disinterested, and as well because of the tone and content of the answers given before us by Park when shown it.

Upon a very careful review and consideration of all the evidence the Tribunal is of the opinion that Mr. Park's conduct was likely motivated, at least in part, by a desire to advance his own interest in the bailiff business by eliminating a rival. Such conduct, if proven, would in our view have been underhanded. Whether it has been strictly proven or not, Mr. Park's conduct has at least the smack and savour of a particularly vicious stab in the back.

We know that Mr. Park is not on trial before us. He was called as a witness for the Respondent but in our view did more to benefit the opposite side. (And be it noted that we congratulate counsel for the Registrar for the integrity and purity of motive displayed in giving the Tribunal the assistance provided by this witness, which are among the many fine qualities he has never failed to display). However, Mr. Park's conduct and method of operation fascinate us. For example, he drove to Toronto and went to the Ministry of Consumer and Commercial Relations offices at 555 Yonge Street. There he looked up a group of six or seven trade names in which he knew various small towing businesses in the Hamilton area were being carried on to see if those names were officially registered and finding that some or all of them were not officially registered; he proceeded to register those names in his own name at a cost of $10.00 each. Thereby he acquired a kind of proprietorship in these names, names under which other people (with whom he had no connection) carried on business. He then further testified that it was his intention to convey or transfer his thereby-acquired interest in at least one of those names to Mr. Roy Porter after the latter had paid him a sum of money (which he told the Tribunal would cover "travel expenses"). Again we look at the definition of fraud quoted earlier in these Reasons, especially the words "a spirit of artifice and scheming and tend[ing] to...injure others" and we ask what was in Mr. Park's mind up to when he registered these names, names of businesses with which he had no connection whatsoever, into his own name? We conclude that he was up to no good.

In short, we do not admire Mr. Park or the way he operates.

We think the purpose of this hearing and whatever disposition results from it should not be to duplicate the function of the Provincial Offences court but to assist the Registrar in his administration and regulation of this industry for the benefit and protection of the consuming public as well as to send signals, by our decisions, for the enlightenment and education of those who engage in the industry.

In the circumstances we feel the Registrar, when contacted by the Hamilton-Wentworth Police, had little option but to prosecute in the Provincial Offences court. However, at this point in time we believe that he has already demonstrated the efficiency and zeal of his staff in tracking down wrongdoing sufficiently to make it clear that irregularites will be detected and not be tolerated - that wrongdoing will be found out and punished.

But we do not think that to take an otherwise efficient, conscientious and reliable bailiff, such as Mr. Acker, with an evident sense of personal pride and jealous of his reputation, and to expel him in ignominious circumstances and disgrace from the bailiff industry would necessarily advance the interests either of the public or the industry. Provided Mr. Acker has learned his lesson, and we believe he has been through a terribly chastening ordeal, intensely expensive and embarrassing, a learning experience such that he is likely to bear what has happened to him in mind in the future, we believe that he should be given one more chance.

The justice of the peace who delivered the decision of the Provincial Offences court seemed concerned, as has been the Registrar, with the irregularities in Mr. Acker's bookkeeping. In the Reasons for proposing to revoke the appointment of James Acker, the Registrar states in B(3) "It is alleged further that during the period of January 1979 to January 1982, Acker failed to keep and maintain books of account as prescribed by section 13(3) of the Bailliff's Act, R.S.O. 1980, Chapter 37." Because of his lack of knowledge of bookkeeping James Acker in 1977 asked L.V. Miller of Miller Accounting firm in Hamilton to keep his books as Miller agreed. Miller, according to Acker's testimony did not know that he needed double entry bookkeeping as required by the Bailiffs Act, Section 13(3). Exhibit 16 shows Acker's unaudited balance sheet relating to the bailiff business December 31st, 1981 done by Miller. We have not dealt at any length with this aspect of the case because we are convinced upon the evidence that the assertions made on his behalf in argument are correct, that is to say, that his bookkeeping though sloppy or inadequate did not reveal any desire or intention to defraud nor any wilful inclination on his part to defy the Bailiff's Act or any other law. In our view, the Registrar may be assured his future bookkeeping will be properly and honestly done through the hiring of a competent accountant and the filing of regular returns.

Mr. Ivan Galland of Doane Raymond substantiated this and said that Mr. Acker told them he wanted double entry bookkeeping and wanted the books done properly and correctly. An audit was not done since Doane Raymond had never before acted for a bailiff and did not know the provisions of the Bailiffs Act. They are presently waiting for Acker to bring his books back for an audit.

In the opinion of the Tribunal the net effect of the proceedings in the Provincial Offences court was that Acker was publicly chastised and punished. It is our further opinion that the purpose of chastisement is to reform and correct. The question before us now is whether Mr. Acker, having been chastised, has been suitably and adequately chastised to ensure the correction and reformation of his ways so that we can say, at this present point in time and looking towards the future, having in mind the wording of Section 9(b), this man in the opinion of the Commercial Registration Appeal Tribunal is competent and with capacity to act responsibly as a bailiff.

In this case the Tribunal is optimistic and the answer is yes.

In the opinion of the Tribunal he has undoubtedly learned much from this ordeal and hopefully will provide efficient and responsible bailiff services at modest rates to the Hamilton-Wentworth community and demonstrate his fitness to practice in this industry.

However, out of regard for the misgivings of the Registrar and in deference to his very proper concerns, the Tribunal attaches the following terms and conditions to its Order:

1. That James Acker submit an audited statement to the Registrar annually (Section (3) and (4) of the Bailiff Act;

2. That James Acker keep a separate trust account in an accredited financial institution for all money received on behalf of other persons Section 13(7);

3. That James Acker refrain from arranging to sell cars unless or until he is registered as a motor vehicle dealer. Repossessed cars must go to an independent auto auction.

By virtue of the authority vested in it under Section 10(4) of the Bailiffs Act and subject to these terms and conditions the Tribunal Orders and Directs the Registrar to refrain from implementing his Proposal and not to revoke the appointment of James Acker as bailiff. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Registrar of Collection Agencies under the Collection Agencies Act. The appeal had not been concluded at the time of this publication.

GERALD E. TRYON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE COLLECTION AGENCIES ACT

TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
BARBARA SHAND, MEMBER
SEYMOUR EISLER, MEMBER

COUNSEL: GERALD E. TRYON, appearing in person

A.N. MAJAINA, representing the Respondent

DATE OF
HEARING: 26 March 1985 Toronto

REASONS FOR DECISION AND ORDER

In the application form which is the basis of this hearing the Applicant did not answer question No. 7 correctly; to the direction "If yes, give full particulars", he stated:

> "Fraud - '77, Fraud '83. Time served - presently on parole til Nov. 28"

He failed to disclose a long list of convictions set out in the Notice of Proposal which the Appellant does not dispute with one exception, January 25th, 1977, that the Tribunal accepts as such.

The Tribunal is on record time and again as to the importance of the application being answered correctly, in that the same forms the basis for the exercise by the Registrar of his judgment. Based on its analysis in individual situations, the Tribunal has time and time again upheld the Registrar's position in the Notice of Proposal in these matters. Cases in this regard have been cited by counsel for the Respondent.

The Tribunal is on record that it does not follow that the incorrect application automatically leads to disentitlement; there is still the exercise of judgment with respect thereto.

The Tribunal reiterates its position that a grave responsibility lies upon the Applicant to complete the application correctly and in full. The Tribunal finds in this instance no reasonable explanation by the Appellant. The Tribunal finds in this instance in respect of the incorrectness and incompleteness to make full disclosure (failure to give full particulars) on the application form that such past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal is not unsympathetic to the Applicant and is cognizant of the tremendous challenge to the Applicant that this decision may create. However, the Tribunal must be mindful of the public interest and the difficulties that the incomplete application form may have led to.

Accordingly by virtue of the authority vested in it under Section 8(4) of the Collection Agencies Act, the Tribunal directs the Registrar to carry out his Proposal and to refuse to grant the registration.

However, the Tribunal reminds both parties of the section in the Act which reads:

> Section 9
> " A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

BORDEAUX RESTAURANT LIMITED
(LICENSEE OF BORDEAUX RESTAURANT)

APPEAL FROM A PROPOSAL OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO REMOVE A "TERM AND CONDITION"
ATTACHED TO THE DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
DENNIS EGAN, MEMBER

COUNSEL: WILLIAM P. SOMERS, representing the Appellant
CHRISTOPHER J. WILLIAMS, representing the City of Scarborough
MRS. JEAN CUNNINGHAM, representing the Objectors
LYNDA HUURRE, appearing in person
S. A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 5 March 1985 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Bordeaux Restaurant Limited, Licensee of the Bordeaux Restaurant situate at 16 Bimbrok Road, in the City of Scarborough, from the Decision of the Liquor Licence Board of Ontario dated the 22nd day of November, 1984, refusing to remove a "Term and Condition" attached to the dining lounge licence of the Appellant, which "Term and Condition" was imposed by the Order of the Board on the 13th day of March, 1980, whereby the sale and service of alcoholic beverages shall cease at 8:00 p.m. daily. It appears that this "Term and Condition" was originally imposed because of the failure of the Licensee to meet the required food/liquor ratio as imposed by the regulations contained in the Liquor Licence Act. The Tribunal was also advised that there had been two prior applications made for removal of the "Term and Condition" pursuant to the provisions of Section 9(2) of the Liquor Licence Act, one in April of 1981 and one in January of 1983, and both of the prior applications were refused. The Appellant has brought this application on the grounds that there is a change in circumstances which warrants the removal of the "Term and Condition".

The first witness called on behalf of the Appellant was Stephen Kochovski who is the principal shareholder of Bordeaux Restaurant Limited, and has been involved in the operation for the past seven years and has been the sole owner of the corporation during the past 14 months. Mr. Kochovski testified that prior to that time he had a partner who owned 40 per cent of the shares but that the business was not prospering and Mr. Kochovski took over sole control of the company and operation. He stated that he manages the restaurant for the period from 12:00 noon to 5:00 p.m. and that his wife takes charge of the restaurant each day from 5:00 p.m. to closing time at 8:00 p.m. He testified that prior to January of 1984 the Licensee did have a rough type of clientele, but that since he took over control of the operation the clientele has changed and now consists mainly of businessmen. The restaurant is located in a shopping plaza consisting of a printing shop and three medical offices as well as the restaurant and is located at 16 Bimbrok Road.

Counsel for the Appellant referred the witness to the summary of the food/liquor sales ratio for the months of January, 1984 to September of 1984, inclusive, in Exhibit 6, being the record of proceedings before the Liquor Licence Board, and the witness confirmed that these figures were accurate. The liquor sales for the month of September, 1984, represented 75.6 per cent of the total sales and the best month for the Licensee was February of 1984 when liquor sales represented 69.3 per cent of the total sales. The witness stated that the fact that he must close at 8:00 p.m. drastically interfered with his evening dining room operations and prevented customers from wanting to have dinner at his establishment when they could not obtain wine or liquor with their meal subsequent to 8:00 p.m. Mr. Kochovski testified that he owned another restaurant in the area known as Monsieur Coco and that the liquor licence for this establishment had no "Term and Condition" imposed and he, therefore, was permitted to sell liquor until 1:00 a.m. He stated that the food/liquor ratio for Monsieur Coco was in proper proportion at all times.

The witness referred to pages 10 to 21 of Exhibit 6 which contained copies of 12 pages of petitions from customers of the Bordeaux Restaurant in support of an application for an extension of the hours during which alcoholic beverages may be served with meals. The witness stated that all of the petitions had been signed in the restaurant and included four signatures of restaurant customers who reside on Bimbrok Road. The witness testified that there had been a significant change in the operations during the last 14 months, that better food was served, that there was better management and that there was a better personal relationship with the customers. He acknowledged that there had been complaints in the past, mainly because of a clientele consisting of motorcycle bikers, but that this had all changed since he had taken over control of the operation in January of 1984.

On cross-examination by counsel for the Board, the witness confirmed that the average luncheon check is between $3.00 and $4.00, but that evening prices are much higher. He also acknowledged that there was entertainment at the premises consisting of exotic dancers and that they have always had them and there has been no change in the entertainment. He stated that there were seven other restaurants in the area, but he had no knowledge as to whether they had any problems with their food/liquor ratio.

On cross-examination by counsel for the City of Scarborough, the witness confirmed that he was aware of the prior problems with respect to the operation of the restaurant and the type of clientele that frequented the premises. He stated that he had tried to correct the problems with respect to the food/liquor ratio but had not been very successful. He confirmed that since the liquor licence prohibited the sale of liquor subsequent to 8:00 p.m., he also closed the restaurant at that time and had made no attempt to have the restaurant hours extended beyond 8:00 p.m. He also confirmed that he has had a Metropolitan Toronto Adult Entertainment licence for these premises since 1979.

Upon re-examination, the witness stated that if his hours of operation for the sale of liquor were extended, he would be prepared to discontinue his adult entertainment licence. He confirmed that exotic dancers performed from 12:00 noon until closing time at 8:00 p.m.

The next witness called on behalf of counsel for the Appellant was Milly Kochovski, the wife of the proprietor, who stated that she has only worked on the premises during the past 14 months. She stated that the customers appear to be the same type as at Monsieur Coco and are not the type of customers that create problems. The witness was referred to the petitions contained in Exhibit 6 signed in support of an application for the extension of hours for the sale of alcoholic beverages and she stated that the persons who signed were customers who signed in the restaurant. She stated that she does the cooking and was in charge of the restaurant for the last three hours of each business day. The witness did acknowledge that she did approach some of the residents on Bimbrok Road, but that she did so at the request of the Chairman of the Liquor Licence Board in order to determine whether there was support from the neighbourhood.

The next witness called on behalf of the Appellant was Alfred A. Roth, a retired assistant manager of an LCBO store, who stated that he had been a customer of the restaurant for about one year. He stated that he likes the Bordeaux Restaurant but that he does not eat dinner there because time is too short before the 8:00 o'clock closing. He stated that his wife works and does not get home in time to go to the Bordeaux Restaurant for dinner. He stated that he heard that the Bordeaux Restaurant was in trouble and decided on his own to check into the place. He found the clientele quite sociable and has never seen any fights or drunkenness or problems of that kind.

The Appellant called as his next witness Robert N. Forbes who was a customer who went to the Bordeaux Restaurant three to four times per week for lunch or for a drink after work and has been a patron for two and one-half years. He used the restaurant for business luncheons and stated that he was the national sales manager for an appliance company. He stated that he was aware of the change in ownership over the last 14 months and that there had been a significant improvement in the premises. He stated that there were far more white-collar customers, but acknowledged he did not take his family to the restaurant. He stated that he would not go to the Bordeaux Restaurant for dinner since he usually would go out to dinner between 7:30 p.m. and 8:00 p.m. and the Bordeaux Restaurant would be closed by that time. He stated that he would use the Bordeaux Restaurant in the evening for dining if the hours of operation were extended.

The last witness called on behalf of the Appellant was Jennifer Sisson who was the bartender and a waitress at the Bordeaux Restaurant for the last 14 months. Prior to that time she had worked for Mr. Kochovski at Monsieur Coco. She stated that she found the present clientele of the Bordeaux Restaurant very sociable and that they did not create any problems. She worked from 12:00 noon to 8:00 p.m. five days a week and that she found there to be no unusual events other than two minor arguments between customers during the 14 month period and, on both occasions, the customers were barred from the restaurant. She stated that she had been a waitress for 11 years and had taken a course in hospitality training at Centennial College. She stated that the evenings were very quiet as a result of the early closing at 8:00 p.m.

Counsel for the City of Scarborough did not call any witnesses but filed with the Tribunal as exhibits extracts from the Minutes of Council together with the reports of the Law Department to Board of Control. He also referred to pages 22 and 23 of Exhibit 6 which contained a by-law amendment of the Corporation of the City of Scarborough together with the Order of approval of the Ontario Municipal Board, which amendment had the effect of prohibiting adult entertainment parlours except in hotels having 50 or more bedrooms. However, counsel for the City of Scarborough confirmed that the Bordeaux Restaurant would be a legal non-conforming use since it had an adult entertainment licence prior to the passing of the by-law.

The next witness before the Tribunal was Jean Cunningham, a resident of Bimbrok Road, who presented a petition from the residents containing 158 names objecting to the removal of the "Term and Condition". She stated that the main concern of the residents was that if the "Term and Condition" was removed and the restaurant was permitted to serve alcholic beverages until 1:00 a.m., this, combined with the adult entertainment licence, would create many problems for the residents of the neighbourhood. She stated that the neighbourhood consisted of mainly home owners who were non-transient and that younger families were recently moving into the area. She stated that when the Bordeaux Restaurant was permitted to operate until 1:00 a.m., there were many problems, but that after the 8:00 p.m. closing was enforced, things did improve.

Two further witnesses gave evidence on their own; one, Lynda Huurre, a resident of the area, and the other, Alderman Florence Cruikshank of the City of Scarborough who is the area Alderman. Both witnesses stressed in their evidence that they felt that the problems that arose resulted from the existence of the adult entertainment licence.

Counsel for the Appellant argued that there had been a change in circumstances pursuant to Section 9(2) of the Liquor Licence Act which warranted the removal of the "Term and Condition" and he referred to the evidence of the change in operations since January of 1984. He admitted that there had been a poor operation prior to that time and that friction had developed with the neighbours which continued even though the operation had substantially improved. He confirmed that the food/liquor ratio is out of balance but stated that this resulted solely because of the requirement of the early closing. He referred to Mr. Kochovski's evidence that he had no trouble meeting the ratio in the other restaurant, Monsieur

Coco, owned and operated by him, and which restaurant remained open until 1:00 a.m. He argued that this was the only restaurant to his knowledge in Toronto with this restriction imposed upon it and that it was not practical to expect customers to be able to eat dinner and be out of the premises by 8:00 p.m. He referred specifically to the customers who were called as witnesses. He stated that the restriction inhibits orderly, leisurely dining. Counsel for the Appellant stated that he was prepared to recommend that if the "Term and Condition" was removed, a further condition be imposed by the Tribunal that the adult entertainment licence be surrendered in return for extended hours of operation for the liquor licence and that a condition be imposed that the restaurant hours of operation be extended under the Metro restaurant licence.

Counsel for the Board argued that there must be a change in circumstances in order for the "Term and Condition" to be removed. He referred to the prior circumstances since the premises were licensed in September of 1977, at which time the Liquor Licence Appeal Tribunal found that the restaurant was, in fact, a place of entertainment rather than a dining room. He stated that the entertainment still exists and that the owner has made no real attempt to change the situation. Counsel argued that the Appellant should have made a prior application to increase the hours for the sale of food first and show his good faith by operating a proper dining room and then when this additional evidence is available, the Appellant should make an application for removal of the "Term and Condition".

Counsel for the City of Scarborough argued that the evidence was clear that there had been no change in the circumstances. He referred to the June 6, 1979 Decision of the Liquor Licence Appeal Tribunal, together with the evidence that the ratio is still not being met. The "Term and Condition" was attached in 1979 when the restaurant was not meeting its ratio. He suggested that an appropriate method of changing the restaurant's operations would be to first of all have the hours of the restaurant extended and also to discontinue all forms of entertainment.

The Tribunal is of the opinion that there has been no real change in circumstances sufficient to warrant the removal of the "Term and Condition" originally imposed with respect to the sale of alcoholic beverages. The "Term and Condition" was primarily imposed because of a failure to meet the food/liquor ratio which, at that time, was 50/50. Now the food/liquor ratio under Section 9(6) of Regulation No. 581 under the Liquor

Licence Act requires food sales to be only 40 per cent of the total sales but, on the admissions of the Appellant, the highest food sales in the last year were for February of 1984 when they reached 30.7 per cent, nearly ten per cent short of the required ratio. In the past, the Board has imposed a "Term and Condition" reducing the hours of operation when the ratio cannot be met rather than extending the hours of operation. There has also been no real attempt to change the type of operation from one which stresses adult entertainment to one which stresses the operation of a dining lounge. In the opinion of the Tribunal, there must be a substantial change in circumstances in order for the removal of the "Term and Condition" to be warranted and, in this appeal, the Tribunal finds that there has been no change of circumstances as required by Section 9(2) of the Liquor Licence Act which would justify the removal of the "Term and Condition".

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 22nd day of November, 1984, whereby it refused to remove the "term and condition" attached to the said Licence.

583021 ONTARIO LIMITED
(J.B.'S CORRAL II RESTAURANT)

APPEAL FROM THE DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE
OR ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
EMIL RINDERLIN, MEMBER

COUNSEL: DAVID A. CROWE, representing the Appellant

S.A. GRANNUM, representing the Liquor Licence Board

JULIA WEST, representing The Ontario Hotel and Motel Owners Association and Kenneth Willcocks

LUBA KOWAL, representing the Minister of Consumer and Commercial Relations for the Province of Ontario

DATE OF
HEARING: 7 May 1985 St Catharines

REASONS FOR DECISION AND ORDER

This is an appeal by 583021 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 18th day of December, 1984, wherein the Board refused to issue either a dining lounge licence or an entertainment lounge licence for the premises known as "J.B.'s Corral II Restaurant", situate at 189 - 241 Dieppe Road, in the City of St. Catharines.

The applicant had originally applied for a dining lounge licence for the said premises on the 23rd day of August, 1984 for premises with a total seating capacity of 996 persons. Subsequently, the applicant submitted a further application for an entertainment lounge licence in lieu of the dining lounge licence, but the second application was not included in the notices of the public meetings and other proceedings before the Board. On the 23rd day of October, 1984, the Board issued a Notice of Proposal to refuse to issue a liquor licence for either a dining lounge or an entertainment lounge licence and the Appellant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act. A hearing was held on the 18th day of December, 1984, at which time the Decision of the Board was to refuse the said applications on the grounds that:

(a) the applicant corporation and its sole shareholder and officer, Mrs. Jean Biasucci, appear to have little or no knowledge of the plans and proposed method of operation of the new facility;

(b) Mrs. Biasucci, as the principal shareholder of 476535 Ontario Limited, operating J.B.'s Corral Restaurant in Niagara Falls, Ontario, has demonstrated a lack of knowledge and inability to operate or supervise a licensed premises in accordance with the provisions of the Liquor Licence Act, especially as it pertains to achieving or maintaining the appropriate liquor/food ratio; and

(c) the application for the licence did not disclose a financial interest of Joseph Biasucci in any of the documents submitted to the Board, wherein it appeared that he had advanced the sum of $100,000.00 towards the construction of the Dieppe Road facility.
Mr. Biasucci is the husband of Jean Biasucci.

Counsel for the Ministry of Consumer and Commercial Relations made a preliminary objection with respect to the issuance and serving of a subpoena in these proceedings on Willis L. Blair, the Chairman of the Liquor Licence Board of Ontario, who was one of the members of the Board who conducted the public hearing on the 18th day of December, 1984, and the Decision which is the subject of this appeal was issued over the signature of Mr. Blair as Chairman. Counsel argued that Mr. Blair could provide no evidence with respect to the hearing before the Tribunal as this hearing is a "hearing de novo" and the Tribunal must consider the evidence on the merits. She also argued that the evidence of Mr. Blair is not admissible since, although he is a competent witness, he is not a compellable witness. Counsel argued that under Section 12(1) of the Statutory Powers Procedure Act, the evidence of a witness must be relevant and admissible and that the status of Mr. Blair as Chairman of the Liquor Licence Board is the same as an "inferior judge". Counsel argued that the power of the Tribunal to require testimony is discretionary and that the

Tribunal should use its discretion in not requiring the witness to testify. She referred the Tribunal to the case of Re: Clendinning and Board of Police Commissioners for City of Belleville (1977) 15 O.R. (2d), p. 97, wherein Mr. Justice Steele held that a Judge of a Provincial Court is a competent witness before a Board of Police Commissioners, but that he is not compellable. Counsel also advised the Tribunal that in the event the Tribunal found Mr. Blair to be a compellable witness, she wished to exercise her right to ask for an adjournment so that an application for a stated case could be made to the Divisional Court.

Counsel for the Appellant advised the Tribunal that the matters of evidence required from Mr. Blair were with respect to matters which occurred subsequent to the filing of the appeal. He advised that he had not yet made a decision as to whether he would call Mr. Blair and that the objection by Counsel for the Ministry was, therefore, premature until such time as he had actually made his decision in this matter. The Tribunal, therefore, reserved its decision as to whether Mr. Blair was a compellable witness pending his actually being called as a witness in these proceedings.

Counsel for the Liquor Licence Board advised that he was calling no witnesses and would be turning the case over to the objectors to file their evidence. He submitted that the matter before the Tribunal today was strictly the matter of the appeal from the Decision of the Liquor Licence Board dated the 18th day of December, 1984, and that any subsequent matters which had come before a Judge of the Supreme Court in Weekly Court in Toronto were irrelevant.

Counsel for The Ontario Hotel and Motel Owners Association called as her first witness Mr. Kenneth Willcocks who was the past Chairman of the Association. He stated that he had been present at the hearing before the Liquor Licence Board in December and had heard the evidence submitted at that hearing. He stated that the objections made on behalf of The Ontario Hotel and Motel Owners Association were a concern that the property owned by the same principals and operated as J.B.'s Corral in Niagara Falls had not been operating in accordance with law for a number of years. He stated that his source of information came from a meeting that he had with Mr. Willis Blair, Chairman of the Liquor Licence Board, and an inspector of the Board who had recently made inspections of the Niagara Falls premises and that as a result he had been advised that J.B.'s Corral in Niagara Falls had not been meeting its proper liquor/food ratio as required by the Act. He suggested that the St. Catharines operation would be a mirror image of the Niagara Fall's operation. The witness stated that he had inspected the Niagara Falls premises and found that they contained mainly small tables which could not be used for dining, that there were no visible menus and that the premises were not really a dining lounge. He was concerned about the apparent failure on the part of the Licensee to meet the ratio, but he acknowledged that he had no information regarding the ratio. On examination by Mr. Grannum, the witness confirmed that he had not made any survey with respect to the needs and wishes of the community as they related to the application which had been submitted by the Appellant.

On cross-examination, Mr. Willcocks acknowledged that he represents the competitors of the Appellant but that he was not concerned with respect to the competition and was only concerned about the ratio. He further acknowledged that he was not aware that the proposed menus for the Appellant's premises in St. Catharines had been approved by the Liquor Licence Board and he had made no inquiries in this connection. He stated that the premises in Niagara Falls were on a main artery and that there were many other licensees in the area, but that he had not seen the St. Catharines operation. He stated that his main objection is that the Niagara Falls operation does not apparently meet the ratio and he would expect the same thing to happen here. When questioned about the status of Mr. Biasucci, he stated with respect to his financial interest that he was not aware that Mr. Biasucci was merely a simple guarantor to a bank loan. He also aknowledged that the enforcement of the liquor/food ratio in accordance with the regulations under the Liquor Licence Act is the responsibility of the Board.

The next witness called by Counsel for The Ontario Hotel and Motel Owners Association was John K. Bak who is the operator of licensed premises in Port Colborne and was a member of the Association and the zone director for the St. Catharines area. He stated that he represented the hotels in this area and that there were approximately 235 licensed premises in Zone 8. This resulted in 18,000 to 20,000 licensed seats in liquor establishments in the St. Catharines area and that his prime objection was the commercial effect of an additional 1,000 seats for licensed premises in this area. He stated that the failure of the Appellant to meet its ratio with respect to its Niagara Falls operation is of concern. He also stated that 12 hotel owners had appeared at the first hearing and had expressed their concern with respect to the financial impact of this operation. He acknowledged that he had no copies of the reports, but confirmed that he had heard evidence at the hearing before the Liquor Licence Board that the Appellant was not meeting its proper ratio in Niagara Falls. He stated that the members of his Association were governed by the ratio and that the same rules should apply to all.

When questioned by Mr. Grannum, Mr. Bak confirmed that of the 235 licensees in the St. Catharines area, approximately 52 were members of the Association and that he had received his instructions to object to the licence at a meeting of the members of the Association in the St. Catharines area, which meeting had been held on October 11, 1984.

On cross-examination, Mr. Bak stated that the basis of his objection was that the liquor/food ratio would not be maintained and he acknowledged that he does not represent the public in this appeal, but that he actually was representing the competitors of the Appellant. He confirmed that people were travelling to Niagara Falls and that he was concerned with the competition and that the competition was not in the public interest. He also confirmed that he had stated in previous proceedings that he had no objection to the issuance of an entertainment licence.

The next witness called on behalf of the Association was Mr. Russell Cooper, the Executive Director of the Association for the past four years. He was aware that after discussions with Mr. Skypas, an investigator with the Liquor Licence Board, the liquor/food ratio at the Niagara Falls premises of J.B.'s Corral was not being met and that he believed that certain of the statements filed were false. He stated that he had been advised that the reports were not in conformity with spot-checks that had been made.

Mr. Jack Aitken, the operator of the Hotel Esquire in St. Catharines, was called as a witness for the Association. He confirmed that he had been present at the previous hearings in both October and December of 1984 and he stated that he was not concerned about the possible competition which might be created by J.B.'s Corral II Restaurant especially in this day and age when there is a presumption of a right to a licence. He stated that he was concerned about unfair competition where a competitor was not achieving the proper food/liquor ratio. He stated that he had heard evidence of improper ratios and overcrowding with respect to the Niagara Falls operation of the Appellant but on cross-examination, he confirmed that he only had obtained this information through comments at meetings before the Liquor Licence Board and had no direct evidence in this connection.

A witness called on behalf of the Appellant was Ronald McDonald who carried on an advertising and promotion business for restaurants. He stated that he had a degree in Business Administration from Brock University and had previously worked for the Bank of Montreal in bank audits. He stated that he was involved in the promotion of J.B.'s Corral II Restaurant and had been involved with the licence which had been issued to the Appellant on February 2, 1985 and had the books of account from that date. He stated that he oversaw the ratio statements and was aware of the necessity of maintaining the proper food/liquor ratio. He stated that the ratio had been consistently met since the time of the issuance of the licence on February 20, 1985 until its cancellation on May 6, 1985. Mr. McDonald stated that he had knowledge of the preparation of the petition which was filed as an exhibit and was part of the record of proceedings before the Liquor Licence Board and that the petition was genuine to his knowledge.

On cross-examination Mr. McDonald stated that he was also associated with the promotion of the Appellant's Niagara Falls operation and received his instructions from both Mr. and Mrs. Biasucci. He stated that he had knowledge only of the records which were produced to him and he dated and validated the cash register receipts which were delivered to him. He stated that he was aware of the Niagara Falls operation receipts and had prepared the Niagara Falls records including the food/liquor ratio statements for the period from June of 1984. He stated he was aware of the restrictions on the Niagara Falls operation because of the failure to meet the food/liquor ratio and not because of the filing of any false documents. This was the only witness called on behalf of the Appellant.

In argument Counsel for The Ontario Hotel and Motel Owners Association acknowledged that the evidence produced with respect to the Niagara Falls operation of the Appellant was based on hearsay evidence at other proceedings but that the nature of the proceedings dictated her use of the hearsay evidence. She stated that the direct evidence at earlier proceedings had not been made available on this appeal and that Counsel for the Liquor Licence Board had seen fit not to call any evidence. She stated that the evidence in opposition to the issuance of the liquor licence related largely to the poor track record of the Appellant, particulars of which were as follows:

1. The failure to meet with food/liquor ratio together with the uncontradicted evidence of the Liquor Licence Board's own investigators with repect to false records.

2. Evidence of overcrowding. She acknowledged that this also was hearsay evidence but was the evidence of the inspectors before the Liquor Licence Board.

3. The record of the Decision of the Liquor Licence Board and the record of the proceedings before the Board.

Counsel argued that Mr. Biasucci had both a financial and operating interest in the operation and that there was an obligation to make full disclosure, which obligation had not been fulfilled. Reference was also made to Section 6(1) of the Liquor Licence Act and in particular to subparagraphs (c), (d) and (e) relating to the past conduct of the Applicant and activities carried on in contravention of the Act or Regulations. Counsel submitted that this entitled the Tribunal to examine the Niagara Falls operation and consider the past conduct of the Applicant. Counsel also submitted that Section 6(1)(g) of the Act permitted the inclusion of the witnesses which were called before this Tribunal as being within the definition of the public interest and that these witnesses would be affected, not by competition, but rather by unfair competition. Reference was made by Counsel to Section 55 of the Act which gives the Board the right to investigate a licensee. Counsel referred to the fact that the Board had imposed a term and condition and restricted the hours of operation with respect to the Niagara Falls location operated by the Appellant but this decision of the Board is apparently the subject of an appeal and no formal evidence of the Board's Order was filed with the Tribunal.

Counsel for the Board confined his arguments to the Board Decision itself. He firstly argued that Mrs. Biasucci, the sole shareholder of the Applicant corporation only became involved in the Niagara Falls operation in June of 1984 and that this was the start of her experience. He also argued that she had a lack of ability to operate within the ratio with respect to the Niagara Falls premises which resulted in the imposition of a term and condition. He referred to the third ground upon which the Board based its Decision in that there had not been a disclosure of a financial interest of Joseph Biasucci and that there was no fresh evidence with respect to this matter. Counsel argued that the onus was on the Applicant to show the nature of the financial interest and this onus had not been discharged.

Counsel for the Appellant argued that the proceedings before the Tribunal were a hearing "de novo" and that the Tribunal must make its decision on the judicial findings and the evidence before the Tribunal today. He argued that the Statutory Powers Procedure Act gives the Tribunal the right to accept hearsay evidence but there is a major difference between the question of admissibility of evidence and the weight to be given to that evidence. He argued that an Applicant for a licence has a statutory right to a licence unless there is a preponderance of evidence against the application. He stated that the only evidence today is hearsay evidence of spectators who were present at the prior proceedings before the Liquor Licence Board. He argued that it must be incumbent upon the Board to bring forth direct evidence and that it is not the responsibility of the Applicant to answer hearsay and speculation. He referred to the question of general public interest and argued that this was not the case here. There was no public outcry - no ratepayer groups. The opposition only comes from competitors who want no competition. Reference was made by Counsel for the Appellant that there had been an amendment to the application to provide a maximum seating capacity of 544 persons.

After reviewing all of the evidence before it the Tribunal found that there is not sufficient evidence to warrant the refusal of the dining lounge licence to the Appellant. The Tribunal is faced with the problem of hearing an appeal by way of a hearing "de novo" without any direct evidence being filed on behalf of the Liquor Licence Board. There was no evidence called with respect to the lack of knowledge or experience of Mrs. Biasucci and there was no evidence called with respect to the failure on the part of Joseph Biasucci to disclose a financial interest. The only reference to this was an explanation by his Counsel that his financial interest was by way of a guarantee to the Bank. Counsel for the Board produced no evidence such as the direct evidence of investigators or inspectors with the Liquor Licence Board relating to the failure of the Appellant to meet with proper food/liquor ratios as prescribed by the Act with respect to its Niagara Falls operation. There was reference to a Decision of the Liquor Licence Board as it related to the imposition of a term and condition restricting the hours of operation for the Niagara Falls operation but once again there was no attempt to file with the Tribunal any evidence relating to these proceedings such as a copy of the Decision of the Liquor Licence Board. It was also acknowledged that the Board Order imposing a term and condition was under appeal and was therefore not final The only direct evidence was the witnesses of The Ontario Hotel and Motel Owners Assocation but the evidence of these witnesses related to what they apparently heard as spectators at prior proceedings of the Board. We also have the very confusing but nebulous reference to the fact that the Liquor Licence Board, by a second Order dated February 20, 1985, issued a dining lounge licence for these premises but that on appeal by the Ministry of Consumer and Commercial Relations, the Supreme Court quashed the second Order.

Reference was made to Section 6(1)(g) which refers to the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located but in the opinion of the Tribunal the objections of competitors cannot be classified as indicating the needs and wishes of the public in the municipality. Reference was made to the filing of false statements by the Appellant and to investigations carried on pursuant to Section 21 of the Act but once again there was no direct evidence called to substantiate these allegations. There is no concrete evidence before this Tribunal to justify the denial of the Applicant's basic right to a licence pursuant to the provisions of Section 6(1) of the Liquor Licence Act.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal revokes the Order of the Liquor Licence Board of Ontario dated the 18th day of December, 1984 and directs the Board to issue a Dining Lounge Licence to the Appellant for a maximum capacity of 544 persons.

575547 ONTARIO LIMITED operating as
KATIE'S ROADHOUSE RESTAURANT

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
ROBERT COWAN, MEMBER

COUNSEL: MILKA VUJNOVIC, representing the Appellant

S.A. GRANNUM, representing the Respondent

DEBBIE RUSS, appearing in person

DATE OF
HEARING: 21 November 1984 Hamilton

REASONS FOR DECISION AND ORDER

This is an appeal by 575547 Ontario Limited from the Decision of the Liquor Licence Board of Ontario dated the 5th day of September, 1984, wherein the Board refused to issue a dining lounge licence to the Appellant for the premises known as "Katie's Roadhouse Restaurant" situate at 1300 Garth Street, in the City of Hamilton.

The Tribunal dealt with certain preliminary matters at the commencement of the proceedings. The Appellant advised that it was amending its application from one for a dining lounge licence for the said premises to an application for a dining room licence to permit the sale of wine and beer only with meals. In addition, the Appellant advised that the name of the premises had been changed from "KATIE'S ROADHOUSE RESTAURANT" to "KATIE'S PLACE". The Tribunal also approved the adding of Debbie Russ, a citizen who had opposed the application before the Liquor Licence Board, as a party to the proceedings.

The Appellant had applied to the Liquor Licence Board for a dining lounge licence on the 20th day of February, 1984, and the Board issued a Notice of Proposal to refuse to issue the said licence on the 18th day of May, 1984. The Appellant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the

5th day of September, 1984, at which time the Decision of the Board was to refuse the application on the grounds that the issuance of a dining lounge licence for the said premises was not in the public interest, having regard to the needs and wishes of the community.

Counsel for the Board called as his first witness Miss Russ who resides approximately 300 feet west of the Appellant's premises. Miss Russ advised that she was opposed to the issuance of a licence, but was not opposed to the restaurant, itself, and she had been instrumental in taking up a petition in an area of approximately four square blocks adjacent to the restaurant premises where she felt people were most directly affected by the issuance of a licence. She stated that her basic concerns were the existence of two schools, one a separate school and one a public schoool, with approximately 1,100 students, which schools are situate at the end of Garrow Drive and there are many activities carried on for children at the schools. Miss Russ stated that approximately 50 per cent of the children passed the intersection of Garth Street and Garrow Drive which is the location of the plaza containing the Appellant's restaurant. There is a variety store in the plaza and there is a school crossing guard at this intersection. Miss Russ stated that there was also a public bookmobile which came into the plaza for three hours on Thursday night each week. She stated that there had been in the past a great deal of vandalism, some from drinking teenagers, and there were incidents of cars being damaged. Miss Russ expressed her concern about property values being reduced in the event that a dining lounge licence was issued. She stated that there were now three empty stores in the plaza and that a new addition to the plaza with five to six proposed new stores was being constructed at the present time. Miss Russ stated that within a ten minute drive from the corner of Garth Street and Garrow Drive there were 22 licensed restaurants on Upper James Street, and she stated that the zoning for the total area of this neighborhood is residential except for the plaza which is zoned commercial.

On cross-examination, Miss Russ stated that she represented concerned citizens of the area, although there had been no formal organization created. There had been three meetings of citizens in the period of March and April in 1984 at Miss Russ's residence and approximately eight to ten people attended each of the meetings. She stated that she had always been concerned with activities in the plaza and had previously called the police because of people "hanging around" the plaza. She stated that older teenagers presently created problems, but she acknowledged that she had not contacted the owners with respect to these problems because they had no authority. She felt that there was presently a serious drinking problem and that this problem would increase if the premises were licensed. She was concerned about the behaviour of patrons after they would leave the licensed premises. Miss Russ stated that she did not think that the issuance of a dining room licence would alleviate the drinking and driving problem presently existing in the area. She stated that she had never been in the restaurant, but had no objection to the restaurant, itself.

The next witness called on behalf of the Board was Sister Claudia, the Principal of St. Catherine of Siena Separate School. She had originally filed a letter of objection with the Liquor Licence Board. She gave evidence that there were approximately 400 students attending her school and she was opposed to the licence because of the location of Katie's Place. She stated that as an educator she was concerned about the welfare of the students and she felt that the licence would increase the danger to her students. She stated that two children in her school had been sexually molested in the past year and she felt that the availability of alcohol would compound this problem. She stated that there was presently a lot of loitering around the school and that the issuance of a dining room licence could increase vandalism at the school.

On cross-examination, Sister Claudia stated that there had been no approach by parents to her showing concern about the issuance of a licence, but that these were concerns of her own. She said that there were various evening activities at the school, including Cubs, Scouts, Brownies and Guides, and that during the noon hour a lot of children would leave the school to go to the variety store in the plaza to buy candy. She felt that the issuance of a licence would bring the problems of society closer to the schools and residences in the neighborhood. She stated that she was appearing to express her personal concerns.

The next witness called on behalf of the Board was James Alexander Bethune who was the Alderman for Ward 8 on the Municipal Council for the City of Hamilton. Mr. Bethune stated that he had had numerous calls opposing the application and that he opposed the application because of the opposition of certain residents in the area and the history of previous problems in the plaza. He stated that, in his opinion, the issuance of a dining room licence would compound these problems and that he was expressing the concerns of the educators in the area. On cross-examination, Mr. Bethune stated that he had no record of the number of phone calls received, but that he felt that he represented the people who had signed the petition in opposition to the application for the licence. He stated that he had supported applications for licences in the past, but could not recall what applications he had supported. He stated that he had never been called personally with respect to vandalism problems in the plaza. He stated that he was present today as an Alderman representing his Ward and that no formal action had been taken by the Municipal Council of the City of Hamilton with respect to the application. He stated that he had no comment with respect to the suggestion of an earlier closing time in the event that a licence was issued. He stated that he had attended at Katie's Place and that they were nice, pleasant premises and that he had no problem with respect to the restaurant.

The next witness called on behalf of the Board was Brian Albert Charlton who is a member of the Provincial Legislature for the Riding of Hamilton-Mountain. The premises and neighborhood are not located in his Riding, but he had been approached by a group of people in opposition to the licence about two weeks prior to this Appeal in view of the fact that the Member of the Legislature for the Riding in which the premises and neighborhood are situate had recently resigned. Mr. Charlton was not aware of the specific problems at this location, but he stated that his constituency office received many calls each week from people in his Riding expressing concerns about the makeup of their community. He stated that there was increasing vandalism and violence everywhere including increased charges for impaired driving and that he felt there was a growing concern within the community as a whole that there were already enough licensed premises in the municipality.

On cross-examination, Mr. Charlton advised that the only complaints he had ever heard with respect to Katie's Place were from Miss Russ and the group present today. He acknowledged that there had been one application for a dining lounge licence within his Riding in a similiar area and he had not objected to that application. He stated that he had no knowledge of the particular issues with respect to this Appeal.

Counsel for the Board called two additional witnesses who were residents in the immediate area and who opposed the application. Each was concerned with the present problems that occurred in the plaza with illegal drinking, beer bottles being left on the lawns of properties in the area and the noise which will occur in the summer months when the windows are open. One witness, a Mrs. Helen Harding, stated that she was opposed to the sale of "booze" and was even opposed to the existence of the restaurant in the plaza. She stated that she was now disturbed by the sound of car doors of people going to the Mac's Milk and the variety store in the plaza.

Sister Claudia was recalled briefly with respect to further vandalism which was occurring in the area of the two schools but, on cross-examination, she confirmed that in her opinion there was now less loitering at the plaza and that the young people who were loitering in the area had moved from the plaza to the school yards to do their illegal drinking.

Counsel for the Board referred the Tribunal to the evidence in opposition to the issuance of a licence which had been filed before the Liquor Licence Board and this consisted of a petition containing approximately 160 names together with approximately 60 letters. Included in the 60 letters were approximately 45 letters which were a form letter written on the stationery of West Highland Baptist Church and apparently signed by members of that congregation. The great majority of those letters contained no information or evidence as to the place of residence of the persons signing the letters.

Counsel for the Appellant called as her first witness Mr. Maurice Young, one of the principals of MHY Investments Inc., the owner of the plaza where Katie's Place is located. He stated that the plaza was originally constructed in 1976 and that The Royal Bank of Canada was the lessee of the premises where the restaurant is now located, but that the Bank had closed its branch as part of a plan to consolidate branches in the area and the premises had been vacant for approximately 14 months. Mr. Young stated that a new addition to the plaza was presently under construction containing 11,900 square feet and this would double the size of the plaza. He confirmed that this property was zoned commercial which permitted the construction of the plaza and the use of the premises for a restaurant and dining lounge. He stated that his company owned two other plazas of a similiar nature in the Hamilton area and that there were dining lounge licensed premises in each of these plazas. He stated that he had never known of any complaints by residents in the areas of the other two plazas. He stated that it was the landlord's responsibility to provide proper maintenance for the clean-up of garbage and that there had previously been complaints from the neighborhood about garbage being on the unconstructed portion of the plaza, but that since the balance of the plaza area was the subject of the new construction he felt that this problem had been alleviated. He stated that the plaza provided a total parking area for 97 cars which is substantially in excess of the by-law requirements for a commercial plaza of this size. He stated that the rear of the plaza was fenced with a double wood fence five feet high and that elaborate landscaping plans for the plaza had been included as part of the site plans filed with the Municipal Building Department and this landscaping would be completed in the spring of 1985 when construction was finished. Mr. Young stated that he supported the application and felt that the concerns of the residents in the area as indicated by the evidence given to the Tribunal were magnified. He stated that there had been a lot of illegal drinking in the plaza and that he found many empty beer bottles on the roof of the old section of the plaza when they were commencing construction.

On cross-examination, Mr. Young was questioned with respect to the existing plaza at Gage and Edwina Streets and confirmed that he had never had any objections. He stated that there was a school immediately to the rear of that plaza and that the existence of a dining lounge in the plaza did not appear to create any problems with the school.

The next witness called for the Appellant was William Paul Reynolds, the President of the Appellant corporation. He started the construction of the restaurant in January of 1984 and the restaurant was opened for business on May 22, 1984. He stated that the cost to construct and furnish the restaurant premises was approximately $100,000.00 and that the restaurant has a seating capacity for approximately 110 persons. He stated that it was the intention of the applicant to operate a family restaurant and that there was to be no dancing or entertainment of any kind and that this was presently prohibited by the by-laws of the municipality. Mr. Reynolds stated that the applicant had amended its application to one for a dining room licence permitting the sale of beer and wine only with meals in order to indicate his good faith to the community that this operation was not a "tavern" or "roadhouse". The name "roadhouse" had apparently created a great deal of apprehension in the minds of some residents and resulted in a change of the name for the premises. Mr. Reynolds stated that he had [illegible] to many people in the area and that, in his opinion, 80 per cent of the people in the neighborhood were in favour of the application. He stated that the closest present licensed premises were on Upper James Street which was approximately a 45 minute walk.

Mr. Reynolds filed as exhibits approximately 2,000 letters which were in support of the application for the licence. Mr. Reynolds stated that these letters had been printed by him for distribution on a door-to-door basis and some had been left in the premises to be picked up. Counsel for the Appellant had divided the various letters of support into sections indicating 15 different categories. Mr. Reynolds acknowledged that approximately 400 letters were signed by people who did not live in the general area and were on the west side of the mountain. He stated that the general response of his canvas was that people in the neighborhood do want a place where they can walk to and have a drink with their meal. Mr. Reynolds stated that he had had several meetings in the restaurant with groups in the community and that he had received a letter of support from the Gormley Community Council whereby the executive of that community group supported the issuance of a licence. Mr. Reynolds advised that the Gormley Community Council covered the area lying east of Garth Street. Mr. Reynolds stated that when he first took over the bank there had been some vandalism in the area, but that he made a policy of keeping children away from the front of the restaurant and that this problem had almost completely disappeared. Mr. Reynolds reviewed the letters of objection which had been filed before the Board and he stated that approximately 70 per cent of these letters which were filed by members of the West Highland Baptist Church were from out of the area. He also examined the petition of approximately 160 signatures and he stated that an examination of the place of residence of the various petitioners indicated that many of them were also out of the area. Mr. Reynolds stated that the area definitely needs a family-style restaurant and that the premises would be a general benefit to the community.

On cross-examination, Mr. Reynolds acknowledged that the printed letters of support had been distributed on a door-to-door basis or left in mailboxes and that he had returned on a couple of occasions to pick up letters, although some people had brought the letters directly into the restaurant. He stated that he saw approximately 50 per cent of the people sign the letters of support in the restaurant. Mr. Reynolds stated that there are approximately 5,800 people living in the neighborhood and that since the restaurant has a capacity of approximately 110 persons he would not have to attract people from out of the area in order to have a viable business. When questioned as to the hours of operation for a dining room licence, Mr. Reynolds indicated that he was agreeable to a reduction in hours and that he would be prepared to bow to the wishes of the community.

The next witness called on behalf of the Appellant was Mr. Duncan Beattie who was a Member of Parliament from 1972 to 1974 and is familiar with the Appellant's restaurant. He stated that it was a clean, well-managed premises. Mr. Beattie is a general insurance agent in the area who lives approximately two miles away and has a business on the mountain. He stated that because of the lack of any kind of a liquor licence it was not appropriate for him to have business lunches at the restaurant. On cross-examination, Mr. Beattie acknowledged that there were licensed premises available on Upper James Street, but that it was of benefit to the community generally to have a licensed premises in the immediate area where patrons would not have to drive. He stated that he felt that the Appellant had made a mistake in originally including the name "roadhouse" as part of the business name.

The next witness called by the Appellant was Trina Johnston who lives in the immediate area north of the restaurant. Mrs. Johnston has two children ages 11 and 15 who attend Riddell Public School which is the public school in the immediate area. Mrs. Johnston stated that she has resided in the area for ten years and had signed a letter in support of the application for a licence, and she and her family are regular patrons of the restaurant. She stated that she had talked to many people in the area and she felt that the majority of people were in support of the issuance of a beer and wine licence for Katie's Place. She stated that she had no concern with respect to the safety of her children as they walked by the restaurant. She stated that there had been some vandalism in the general area but nothing outrageous. She stated that Katie's Place was a good quality restaurant and that she, on occasion, would send her son to the restaurant for lunch. On cross-examination, Mrs. Johnston stated that she would support the application even if her residence was immediately adjoining the plaza.

The next witness called for the Appellant was Brian Purdey who lives in a townhouse with his family immediately behind the plaza. He has two children ages 5 and 13 who go to Riddell Public School, and Mr. Purdey has resided at his present address for the last two and one-half years. He stated that there was a previous problem with respect to vandalism in the area in that there was a greenbelt area immediately to the north of the schools which had not been maintained for over three years and contained a large amount of bush. This was an area for a proposed route for the mountain access road and there were a great many teenage parties each weekend. However, the municipality has now cleaned up this area and it has been landscaped and fenced, and this has greatly reduced the attraction to underage drinkers in the area and there are not nearly the problems that existed two years ago. Mr. Purdey had approached Alderman Bethune and members of council together with other residents of the area to have this matter rectified and he was so concerned that he was prepared to move from the area two years ago. Mr. Purdey also stated that there are not nearly the problems that previously existed in the plaza. He knows Katie's Place and takes his family there on occasion. He stated that it was a good family-style restuarant and he had spoken to many people in the area who support the application for the licence. Mr. Purdey stated that he owns his own house and is not concerned about any reduction in property values and that with the improvement in the quality of the plaza this will be of general benefit to the neighborhood.

The last witness called by Counsel for the Appellant was Mr. Michael Riley who resides approximatly three blocks from the plaza. He stated that he had been to Katie's Place on various occasions with his family. He confirmed that he was in the food processing business and provides potatoes to Katie's Place. He stated that, in his opinion, Katie's Place would be a good place for business lunches if there was a licence available.

Counsel for the Board, in argument, stated that the Tribunal is governed by the wording of Section 6(1)(g) of the Act which refers to the needs and wishes of the community. He stated that the Tribunal must consider the expression of "needs and wishes" as being bona fide and that the people in the immediate area must be considered as being the most seriously affected. He referred to the evidence of Mr. Young, the landlord, that there was still some vandalism in the area and that those citizens who are opposed are genuinely concerned that the situation will be worsened. He referred to the evidence of Mr. Bethune, the Ward 8 Alderman, who was of the opinion that the sale of liquor would compound the problem especially with a 1:00 a.m. closing. He also referred to the concerns of Mrs. Harding with respect to the noise late at night. Mr. Grannum referred to the evidence of Mr. Reynolds, the President of the Appellant corporation, who admitted that the licence for him was a matter of survival, but that economic conditions are not matters which should be taken into consideration by the Tribunal and that this is not a test of the Act. Mr. Grannum submitted that on the basis of the evidence before the Tribunal there was no reason to change the Decision of the Board.

Miss Russ, who had been added as a party to the proceedings, argued that the issuance of a licence would be incompatible with a residential area. She stated that the present hours of operation were very inconsistent because of financial difficulties and that the sole purpose of the application was to permit the business to survive. She argued that there was a lot of pressure in the community opposed to the licence and that the community should have a say as to how it survives. She stated that there would be no guarantee as to what the situation would be after the issuance of a licence.

Counsel for the Appellant argued that the onus was on the objectors and the Board to show that the issuance of a licence is not in the public interest having regard to the needs and wishes of the public, and she referred to the case of Re: Donwood Restaurant Limited, (1981) 5 LLAT, page 16, which referred to the question of the onus as being on the Board and the objectors. Counsel stated that regardless of the original name of the operation, it is a restaurant and that the use of the name "roadhouse" was very unfortunate. She referred to the many letters from the West Highland Baptist Church which were opposed to the establishment of a Bar. She stated that all of the evidence with respect to the restaurant was that it was a good restaurant with high standards. The problem of vandalism is a matter of concern for the whole community and the owners of the plaza and the licensee cannot be held responsible for the moral problems of the total community.

The pertinent matter to be dealt with in this Appeal is whether the application for a licence is in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located. There is nothing before the Tribunal to challenge the evidence that the present restaurant is being operated in a proper manner or that the operation of the restaurant has any detrimental effect to the neighborhood. There was also substantial evidence that the problem of underage drinking and vandalism in the area had decreased recently and the Tribunal was impressed with the evidence of Mr. Purdey in this respect. The Tribunal reiterates the Decision in the Donwood case which puts the onus on the Liquor Licence Board and the objectors to the licence to show that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public. The Tribunal finds that this onus has not been satisfied. The witnesses called on behalf of the Board consisted of three residents, Sister Claudia, the Principal of the separate school, the local Alderman and the Member of the Legislature for an adjoining Riding who gave no direct evidence.

Approximately 60 letters were filed in opposition to the application but, as was previously stated, a majority of these letters were filed by members of the West Highland Baptist Church and they were a form letter objecting to a Bar. There was also a petition of approximately 160 names in opposition to the original application for a dining lounge licence.

The evidence submitted on behalf of the Appellant was provided by the Appellant, the plaza owner, three residents of the immediate area and the evidence of a former member of Parliament who is a businessman located approximately three miles away. In addition, there were approximately 14 specific letters of support together with nearly 2,000 form letters of support which were filed on behalf of the Appellant. Counsel for the Appellant had broken down the form letters of support into streets and this enabled the Tribunal to look at the letters of support coming from the streets in the immediate area. This revealed that approximately 193 letters of support came from three streets in the immediate area of the restaurant, namely Garrow Drive, Cranbrook and the Greendale and Greenvale area. Many other letters came from a radius of approximately three to four blocks. In addition, many members of the public attended this Appeal and out of those who signed the sheets made available, ten persons, including those who testified, stated that they were objecting to the issuance of a licence while 65 persons, including those who testified, stated that they were in favour of the issuance of the licence. An examination of the addresses of those persons in support of the application indicated that 36 persons were from inside the area of the immediate neighborhood while 29 persons were from outside the neighborhood area. There is no problem with respect to zoning or parking. The Tribunal also notes the fact that the application has been amended to that for a dining room licence and has also recognized that the Appellant has no objection to a reduction in the hours of operation for the sale and service of beer and wine.

The Tribunal, therefore, revokes the Decision of the Liquor Licence Board dated the 5th day of September, 1984 and directs the Board to issue a dining room licence to the Appellant, subject to the limitation for the hours of operation for the sale and service of beer and wine to be between the hours of 11:00 a.m. to 11:00 p.m., Monday to Saturday, and 12:00 noon to 11:00 p.m. on Sunday.

566469 ONTARIO LIMITED
(LICENSEE OF GIGI'S CAFE RESTAURANT)

APPEAL FROM A DECISION AND ORDER OF THE LIQUOR LICENCE BOARD OF ONTARIO

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE LICENCE.

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN MORNINGSTAR, MEMBER
R. CHEMIJ, MEMBER

COUNSEL: S.A. GRANNUM, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 12 February 1985 Toronto

DECISION AND ORDER

Upon reading the record of proceedings before the Board and upon hearing submissions by counsel for the Board, the Tribunal determines as follows:

1. The Appellant was sent by registered mail the Appointment for and Notice of Hearing the 28th day of November 1984 as evidenced by Exhibit 2 which states:

> "....the hearing by the Commercial Registration Appeal Tribunal will be held in the Tribunal's chambers, 1 St Clair Avenue West, Toronto on Tuesday, the 12th day of February, 1985 at 9:30 o'clock in the forenoon..."

which contains the further notice:

> "....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings.

2. The Appellant has not appeared.

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 18th day of September 1984 and directs the Board to set the date of the commencement of the said "Term and Condition".

DERWYN F.A. FOLEY

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO APPROVE THE ISSUANCE OF A DINING LOUNGE LICENCE

IN RE CHRISTOS LAMPROPOULOS,
(RUNNYMEDE VILLAGE RESTAURANT)

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
ROBERT COWAN, MEMBER

COUNSEL: DERWYN F.A. FOLEY, appearing in person.

EDWARD JUPP, Q.C., representing Christos Lampropoulos

S.A. GRANNUM, representing the Liquor Licence Board

DATE OF HEARING: 11 July, 1985

REASONS FOR DECISION AND ORDER

This is an appeal by Derwyn F.A. Foley from the Decision of the Liquor Licence Board of Ontario dated the 15th day of February, 1985, whereby the Board approved the issuance of a dining lounge licence to the applicant for the premises known as "Runnymede Village Restaurant" at 534 Annette Street in the City of Toronto.

An application for a dining lounge licence had been made on the 15th day of October, 1984 and, after a public meeting held on the 8th day of January, 1985, the Liquor Licence Board issued a Notice of Proposal to refuse to issue a liquor licence to the applicant. The applicant requested a formal hearing before the Board pursuant to Section 11(3) of the Liquor Licence Act and a hearing was held on the 31st day of January, 1985, at which time the Decision of the Board was to approve the application for the dining lounge licence, which Decision resulted in this appeal.

The first witness called by the Appellant was Mr. William H. Temple of the West Toronto Inter-Church Temperance Federation who traced the history of the liquor legislation affecting the area resulting in an area known as the City of

West Toronto being voted "dry" by the residents. It would appear from the evidence submitted that Annette Street forms the boundary between the "wet" area and the "dry" area, but that the premises known as 534 Annette Street which are the subject of the application are not within the "dry" area. Mr. Temple stated that he objected to the will of the people residing in the area being defeated without anybody expressing any desire for the approval of a licence.

On cross examination Mr.Temple was referred to the "Quiet Corner Restaurant" which is a licensed dining lounge on the north side of Annette Street west of the applicant's premises, but he was not aware of that establishment. Mr. Temple stated that he objected to all applications for liquor licences issued in the City of Toronto.

The next witness called for the Appellant was Yuri Shymko, the member of the Provincial Legislature for High Park - Swansea. He submitted that the strip of land along the north side of Annette Street had always been traditionally respected as being part of the West Toronto "dry" area and that the Liquor Licence Board in prior applications had accepted these boundary lines and that this was the first time that the question of the exact location of the boundary had arisen. He stated that boundaries for the prior referendums had included these lands and did not understand why a licence had been granted to the "Quiet Corner Place". The witness asked the Tribunal to look at the needs of the area. He stated that the area was bound by arterial roads and that the nature of the community is reflected in many ways. He argued that the issuance of a licence across the street from the "dry" area is reversing the intentions of the people in the area. He also referred to various licensed establishments on the south side of Bloor Street as more than enough to fulfill the needs of the residents. He stated that to assess the wishes of the residents of the area the Tribunal must look at the results of the referendums held in the "dry" area in 1972 and 1984, whereby in both referendums a majority of the persons casting votes opposed the sale of spirits under a dining lounge licence.

On cross examination the witness confirmed that he did not live in the area but was a resident of the City of York and lived north of St. Clair Avenue. He also acknowledged that the residents on the north side of Annette Street did not have the right to vote in the plebiscite. He stated that his objection was based on the principle of Section 6(1)(g) of the Liquor Licence Act which dealt with the question of the needs and wishes of the residents of the municipality.

On cross examination by counsel for the Liquor Licence Board the witness confirmed the location of various licensed premises on the border of the "dry" area, including premises on the south side of Bloor Street, the north side of Bloor Street west of Jane Street and on Dundas Street. At this time, counsel introduced a letter from the City Clerk for the Corporation of the City of Toronto confirming that the premises at 532 and 534 Annette Street appear to be outside the boundaries of the former City of West Toronto and, therefore, outside of the "dry" area.

The next witness called by the Appellant was Mrs. Erma Pattison, the Executive Assistant of Alderman William Boytchuk, and she read a statement on behalf of Alderman Boytchuk. He stated that a large area to the east and south of the proposed licensed premises voted in favour of prohibition and that there was already one family-type restaurant on the north side of Annette Street to the west of the applicant's premises, which restaurant was identified as the "Quiet Corner Restaurant". He stated that there was no adequate parking and that the issuance of a licence would create traffic problems for the area.

On cross examination the witness, who lives within the "dry" area on Jane Street south of Annette Street, confirmed that there was only one licensed premises on the north side of Annette Street and that no traffic study had been done to determine the effect of an 85-seat restaurant. She stated that the area was one of modest owner occupied homes and that she had heard of complaints with respect to the "Quiet Corner Restaurant", but that there had been no change in the character of the neighbourhood.

The next witness called on behalf of the Appellant was Mrs. Betty Britton who is the proprietor of a small shop at the intersection of Annette Street and Runnymede Road. She had commenced a petition and had presented a petition of 850 names opposed to the application for the licence at the hearing before the Liquor Licence Board in January of 1985 and, at this time, presented a new petition containing a total of 996 names. She suggested that the total of the two petitions indicated the opposition to the granting of a licence. She stated that there were 19 businesses at the immediate four corners of Annette Street and Runnymede Road and that 15 of the 19 businesses had signed the petition opposing the issuance of a dining lounge licence. She argued that parking is poor within the area and that there are four bus stops at the corner of Annette Street and Runnymede Road and that the issuance of a dining lounge licence would create a serious problem for ladies at night.

On cross examination Mrs. Britton confirmed that she operated a small secondhand children's clothing and toy shop called "Betty's Nifty Thrifty Shop" which is located four doors from the corner of Annette Street and Runnymede Road. She stated that some customers drove to her premises but that most came from the neighbourhood and walked. She stated that restaurant patrons always would stay far longer than people dropping in to buy from the shops and that this would intensify the parking problem. The witness acknowledged that one of the businesses in the area was a real estate broker with several sales personnel, all of whom have cars, and that the clients of the real estate office often parked on the street to the west of the office. She acknowledged that most shops were closed in the evening and she had no knowledge of renovations being made to various residential properties for future commercial purposes on the south side of Annette Street. The witness stated that she did not know Mr. Foley, the Appellant, until about two days before the Liquor Licence Board hearing but had started the petition on her own. She stated that she was a total abstainer but that many of her customers would take a drink and that many people who had signed the petition stated that they would go outside of the area for their recreation.

The Appellant then gave evidence to the effect that he lived in the "dry" area to the south of Annette Street and he reviewed the previous proceedings before the Liquor Licence Board. He stated that the Board had no jurisdiction as to the type of entertainment or the amount of parking requirements, but that the issuance of a dining lounge licence for an 85-seat restaurant will create many further parking problems. He stated that the motivation of the witnesses is for peace and quiet within the neighbourhood.

On cross examination Mr. Foley confirmed that he was President of the West Toronto Inter-Church Temperance Federation but that he did not have a copy of any resolution authorizing him to oppose the application on behalf of that federation. He stated that this organization had existed in various forms since 1921 and that it had an executive of 12 members trying to protect the borders of the former City of West Toronto. He stated that he was not objecting to unlicensed premises but only to the issuance of a dining lounge licence. He stated that he had no knowledge of the applicant's financial position, but that he was opposed to the application because it may be the start of an area similar to the area which now exists in the "the Beaches".

The first witness called by counsel for the applicant was Miss Joanna Meropoulos who resides at 104 Evans Avenue within the "dry" area, and she confirmed that the "Quiet Corner Restaurant" is located on the north side of Annette Street at the corner of Evans Avenue. She stated that she is the proprietor of the Becker's Milk Store at the corner of Annette Street and Runnymede Road and passes the "Quiet Corner Restaurant" two or three times a day. She stated that she had never seen any problems at that restaurant. Her shop usually closes at 11:30 p.m. and she stated that she passed by the "Quiet Corner Restaurant" on her way home at night. She stated that she owned the building in which her business was located and she proceeded to review the various establishments located in the area of Annette Street and Runnymede Road. She stated that rather than there being 19 businesses as stated by a previous witness, there were actually 31 businesses within the radius of the four corners. In addition, there were stores under construction at various locations within the area. The witness stated that she supported the application and could see nothing wrong with a dining lounge licence being issued to a small restaurant.

The applicant, Christos Lampropoulos, testified that he presently resided at 521 Annette Street and operated a grocery store at that location. He confirmed that his brother, Gus Lampropoulos, who had 20 years' experience in the restaurant business would be working for him in the new restaurant and that he intended to open a family restaurant in order to serve the immediate neighbourhood. He stated that preliminary plans only had been prepared indicating a seating area of between 80 and 85 seats and that his operating hours would be from 7:00 a.m. to 11:00 p.m., Monday to Saturday. He confirmed that he had had no market survey as to the success of the restaurant but that he had had confirmation from the City Clerk that the restaurant would be located within a "wet" area. The witness confirmed that he had placed a petition in his store in support of the application for the dining lounge licence containing a total of 205 names, and a copy of this petition was filed as an exhibit. The witness also filed as an exhibit confirmation that the premises were approved for commercial zoning under By-law No. 20623 of the City of Toronto which permitted the establishment of a dining lounge. He stated that the Liquor Licence Board required proof of financial ability to construct and operate the premises and that he had satisfied the requirements of the Board.

Under cross examination the witness stated that he felt that he was being discriminated against and that the people circulating the petition in opposition to the issuance of the dining lounge licence were unfairly referring to the possibility of drunkenness and automobile accidents in the area as reasons for opposing the application. In answer to a question from the Appellant, the witness argued that the referendum in 1984 dealt only with the premises in the "dry" area on the south side of Annette Street and did not apply to the area north of Annette Street. He stated that, in his opinion, the residents of the area could now walk to a licensed restaurant and that the risk of driving under the influence of alcohol is reduced.

In argument, the Appellant stated that the Board, under its Notice of Proposal, had refused to issue the licence after the public hearing but that it had reversed itself. He argued that the Decisions of the Chairman of the Liquor Licence Board and the Decision of the Board conducting the public hearing on January 31 were contradictory. He referred to the fears of the people in the area expressed to those people circulating the petition and that the fact that 1,300 people had signed the petition was of utmost importance to indicate that the majority of the people, irrespective of boundaries, do not want the licensed premises and that the voice of the people must be heard. He argued that the granting of a licence will weaken the foundation of the community and that the location of the line down the centre of Annette Street is not important. He argued that the Liquor Licence Board had the discretionary powers to consider not only the legal factors involved but also the welfare of the general area.

Counsel for the applicant argued that the Appellant misunderstood the procedure and that the Notice of Proposal signed by the Chairman of the Liquor Licence Board was only to set out the issues. He stated that there was no doubt from the evidence before the Tribunal that the proposed dining lounge was located outside of the former City of West Toronto and that Exhibit number 15 established the limit as being down the centre of Annette Street. Counsel referred to the Decision of re Temple and the Liquor Licence Board of Ontario, D.L.R., Volume 145, 3rd Edition, 480, which was an Appeal by Mr. Temple with respect to another application for a liquor Licence and in view of the Divisional Court the gambit of public participation is limited to the needs and wishes of the public in the municipality in which the premises are located. All other matters with respect to finance, premises, etc. are of no concern to the community. Counsel also referred to the fact that the applicant's petition was set out in detail and was properly headed and was merely left for people to sign in the applicant's grocery store, while the petition of Mrs. Britton was a door-to-door petition, and counsel argued that the Tribunal must take into account the difference between an active as opposed to a passive petition. He stated that the results of the referendum in 1984 were not significant with respect to this application in that the people supporting the "dry" position were well organized while the people voting in support of licensed premises were unorganized. He also stated that the residents to the north and west of Annette Street were not entitled to take part in that vote and that the premises which are the subject of this application are within that area. Counsel also referred to the fact that Mr. William Temple is a well known professional temperance worker who opposed all liquor applications. He stated that the proposed licensed restaurant was a small restaurant with a maximum of 85 seats. Counsel argued that pursuant to the provisions of Section 6 of the Liquor Licence Act an applicant is entitled to a licence unless he fails to qualify under one of the seven subsections. Counsel argued that the Appellant had failed to establish that the applicant was not entitled to a licence pursuant to the provisions of Section 6(1) of the Act.

Counsel for the Board confirmed that the position of the Board was that they were satisfied to issue the licence and he did not call any additional evidence. He stated that there was no evidence of any objection at the time the dining lounge licence was granted to the "Quiet Corner Restaurant" and that this was a precedent for the issuance of licences outside the old City of West Toronto. There was no evidence that any other applications for licences had ever been appealed and no evidence that any ratepayers associations within the area were in opposition to the licence. Counsel for the Board argued that there was very little difference between the evidence filed before the Tribunal and the evidence filed originally before the Board and that this would not justify any change in the Decision.

After reviewing the evidence and material filed before it, the Tribunal finds that the Appellant has not established that the applicant is not entitled to a licence pursuant to the provisions of Section 6(1) of the Liquor Licence Act and that, specifically, the Appellant has failed to prove that the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises are located, pursuant to Section 6(1)(g) of the Act. There was no evidence before the

Tribunal as to the effect on the quality of life in the neighbourhood which might be caused by a small licensed restaurant with a maximum of 85 seats. The petition filed on behalf of the Appellant only stated "petition against liquor licence at 534 Annette - Runnymede Village Restaurant". The Tribunal also finds that the 1984 referendum held in the old City of West Toronto area was of little significance in that the referendum was only held in the historically "dry" area and did not include the area to the north in which the proposed licensed premises are located. A licence had already been issued for the "Quiet Corner Restaurant" on the north side of Annette Street and there was no evidence of any opposition to or problems with these licensed premises. There was also evidence of the issuance of a dining lounge licence to the "Wedgewood Restaurant" on Bloor Street west of Jane Street which was virtually on the boundary line, and there was no evidence before the Tribunal as to any objection to that dining lounge licence. There is some indication that the people signing the petition in opposition to the granting of the licence were of the opinion that the premises on the north side of Annette Street were, in fact, located within the "dry" area.

The Tribunal, therefore, dismisses this Appeal and directs the Liquor Licence Board to issue a dining lounge licence to the applicant for the premises at 534 Annette Street in the City of Toronto when all other requirements of the Board have been fulfilled.

CARL McDAID ENTERPRISES LIMITED
(LICENSEE OF PAV RESTAURANT)

APPEAL FROM A DECISION OF THE LIQUOR LICENCE BOARD

TO ATTACH A TERM AND CONDITION TO THE DINING LOUNGE LICENCE AND PATIO LICENCE AND
TO REFUSE TO ISSUE AN ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
NEIL VOSBURGH, MEMBER

COUNSEL: WILLIAM H. HAMILTON, representing the Appellant

S. A. GRANNUM, representing the Respondent

DATE OF HEARING: 10 April 1985 Orillia

REASONS FOR DECISION AND ORDER

This is an appeal by Carl McDaid Enterprises Limited from the Decision of the Liquor Licence Board dated the 12th day of June, 1984, wherein the Board imposed a "Term and Condition" to be attached to the dining lounge and patio (dining lounge) licences issued in respect of the premises known as "Pav Restaurant" situate at 188 Jarvis Street, Orillia, Ontario, and further refused the application for the issuance an an "entertainment lounge" licence with respect to the said premises.

On the 5th day of April, 1984, the Liquor Licence Board issued a Notice of Proposal whereby it proposed to:

> "(a) Refuse to issue an entainment lounge licence to the corporation;
>
> (b) Suspend for a period of sixty (60) days the dining lounge licence and patio (dining lounge) licence of the corporation;
>
> (c) Attach a "Term and Condition" to the dining lounge and patio (dining lounge) licences that the sale and service of liquor in the licensed premises shall cease at 10:00 p.m. daily."

The Appellant requested a formal hearing before the Board pursuant to the provisions of Section 11(c) of the Liquor Licence Act and a hearing was held on the 12th day of June, 1984, at which time the Board found that the licensee had carried on activities that were in contravention of the Liquor Licence Act and Regulations and ordered that:

> "(a) There will be a "Term and Condition" attached to the "dining lounge" and "patio" (dining lounge) licences issued in respect of these premises that the sale and service of alcoholic beverages shall cease at 10:00 p.m. daily, the said "Term and Condition" which will take effect on Monday, July 2, 1984, will continue until such time as the licensee corporation submits an application to the Board for its removal, pursuant to Section 9, subsection (2) of the Act when compliance with the regulations has been achieved; and
>
> "(b) The application for the issuance of an "entertainment lounge" licence in respect of the Pav Restaurant be and is hereby refused.

The appeal is taken from that Decision.

The first witness called on behalf of the Board was George Robinson who had been an inspector with the Liquor Licence Board for 16 years. He advised that an application for an "entertainment lounge" licence had been submitted in December 1982 and that structural changes required in order to qualify for a licence consisted of the removal of a partition. He advised that he had made his inspections and had submitted his reports in November of 1983, at which time it was proposed that the patio licence would be surrendered and the operations closed on Sunday. He stated that he made various calls on the licensed premises during that time. Mr. Robinson testified that he had inspected the premises on Saturday, March 12, 1983 and found that the food/liquor ratio was not being met. He stated that the general housekeeping for the licensed premises was poor, that the main kitchen had not been in operation since 1981. He stated that he had visited the premises as late as April 9, 1985, the date before the commencement of the hearing of this appeal, and that there had been no change in the operations. There was a snack bar which was constructed to serve a takeout service which had been in operation since 1983. The service to the dining lounge was effected through a "pass through" from the snack bar kitchen and the staff who operated the snack bar also operated the kitchen. Mr. Robinson stated that he had made 14 visits to the premises in 1983 and at least four visits in 1984. He stated that the kitchen was in a deplorable condition in 1983 and that after a visit on August 8 of that year he referred the matter to the Simcoe County Health Unit. He stated that there were beer cases piled in the kitchen, broken glass, a stove covered with rust, and that the refrigerator was in need of repairs. Mr. Robinson stated that there was a menu board in the dining lounge setting out a variety of fast foods such as hamburger and chicken, but that there were no menus and no liquor price menus. He stated that there were four tables in front of the "pass through" from the snack bar kitchen with place mats only and all other tables in the dining lounge were of the lounge type. Mr. Robinson testified that he had seen the food/liquor ratios filed with the Liquor Licence Board for the months of January, 1983 to December, 1983, and that the only two months that came close to achieving the food ratio of 40 per cent were July of 1983 when the total food served represented 35 per cent of total sales and August of 1983 when food sales represented 33 per cent of total sales.

On cross-examination, Mr. Robinson confirmed that an application for an entertainment licence had been made in 1982 and that at Public Hearings before the Liquor Licence Board in Barrie there were no objections to the issuance of an entertainment licence. He also advised that according to a letter from the Licence Officer of the Liquor Licence Board in May of 1983, there was an indication that the Board was prepared to approve the change to an entertainment lounge licence. He stated that no notice was given to the licensee as to when alterations should be completed. The witness also referred to three convictions of the licensee under the provisions of the Liquor Licence Act, one of which was a conviction for the supply of liquor to a person apparently in an intoxicated condition and the other two, permitting liquor sold on the premises to be taken from the licensed premises. The witness stated that he had seen people leaving with beer from the interior lounge and that the deletion of the patio from the licence would, in his opinion, not reduce the possibility of a repeat offence.

The next witness called on behalf of the Board was Stephen Holubko who was an investigator with the Board. He stated that he visited the licensed premises on November 29, 1984 at about 9:30 p.m. and that most of the patrons were in the main dining lounge area with some people near the pool tables. He stated that there was no food to be seen anywhere in the premises and that he was there for about 40 minutes. He returned on November 30, 1984, at which time he asked for the proprietor and requested the books and records. He was advised that they were not available and he arranged to return on Monday, December 3, 1984, when he examined the books and records to determine the food/liquor ratio. He stated that they were the same figures as reported to the Board. He stated that he was unable to verify them with daily cash register sheets as these were not available.

The only other evidence called on behalf of the Board was the certificates of conviction with respect to the three offences previously referred to which were part of the records filed with the Tribunal.

Carl McDaid, the President of the Licensee, was called as a first witness on behalf of the Appellant. He acknowledged the three convictions which had occurred in January of 1984, but stated that the two convictions with respect to allowing liquor sold on the licensed premises to be taken from the premises dealt with the removal of beer from the patio. In addition, he stated that it was a judgment call on the part of employees of the licensee as to whether or not a person is intoxicated. Much of his evidence dealt with allegations of delay on the part of the Liquor Licence Board with respect to the processing of the application for the entertainment lounge licence and he stated that the alterations requested by the Board were completed by mid-August of 1983. He stated that the snack bar on the premises was used as a normal kitchen and that there were facilities to deep fry chicken and prepare pizzas and steaks. He gave evidence that the equipment was in first class condition but that the grill was rusty because it had not been used. He stated that the ratio records as filed were accurate and he acknowledged that the food for the dining lounge was prepared in the snack bar which he stated was a full kitchen. He stated that the takeout counter was open in July and August of each year, but that during the rest of the year all sales of food were in the lounge area. Mr. McDaid felt that there would be no problem in meeting the 15 per cent ratio required with respect to an entertainment lounge licence if such a licence was issued.

On cross-examination, Mr. McDaid confirmed that he hired a doorman to look after unruly patrons and people coming in under age or perhaps in an intoxicated condition. He was asked why there would be a need for a doorman if this was a bona fide dining lounge. He stated that it was a large area and people, after eating, would stay and enjoy drinking. He stated that in his opinion a waiter or waitress would not know if a person was intoxicated if he stayed sitting at a table. He stated that new steps had been taken to increase food sales by the installation of a pizza oven and a better exhaust system for the kitchen, and he confirmed that new menu items together with daily specials had been included as an incentive to increase food sales.

Mary Agnes McDaid, the wife of Carl McDaid, was also called as a witness and confirmed that she assisted in the operation of the business and dealt with the steps taken to attempt to increase food sales. On cross-examination, she confirmed that she did the books but that she had not brought the records. She confirmed that an application had been made for an entertainment licence because of the food/liquor ratio problems. She stated that if an entertainment licence was issued, they could have as many as 600 patrons and that they might have to open the old kitchen.

In argument, counsel for the Board reviewed the evidence of the liquor inspector and stated that there had been no contravention of his evidence. He referred to the fact that the dining lounge contained a seating capacity for 207 persons while the patio had a seating capacity for 107 persons. He pointed out that food was served on paper plates and that there was no table service. Patrons were required to pick up their own food from a "pass through" at the snack bar and that Mr. Robinson, the liquor inspector, even questioned the figures that had been filed. He pointed out that when notice of the convictions under the Liquor Licence Act came to the Board's attention they issued the Notice of Proposal and that the Decision of the Board was justified. Counsel argued that in view of the failure to comply with the requirements of the Liquor Licence Act and the regulations an application for the issuance of a new entertainment lounge licence should be refused. He argued that the only change in circumstances since April of 1984 was a change in the ratio figures filed, but that the liquor inspector and the liquor investigator had seen no difference in the quality of the operation even after April of 1984. He submitted that there had been no substantial change in the circumstances that warranted upsetting or reversing the Board's Decision. He argued that the "Term and Condition" should stay in effect until the licensee demonstrated his ability to meet the ratio.

Counsel for the Appellant argued that Section 6 of the Liquor Licence Act granted to an applicant a right to a licence and not a privilege to have a licence issued to him unless one of the seven exceptions as set out in Section 6(1) of the Act was applicable and he submitted that none of these exceptions were applicable. He submitted that the increase in food sales in 1984 was adequately explained and that it was incongruous that when the Board suggested that the Appellant apply for an entertainment lounge licence they should then use the ratio figures as a reason for refusing that licence.

After reviewing all of the evidence the Tribunal is of the opinion that the Decision of the Liquor Licence Board dated June 12, 1984 should be upheld. The Tribunal finds that the evidence of the ratio figures filed for the period from April of 1984 to December of 1984 indicated that only in four of the nine months in that period was the licensee in compliance with the proper food/liquor ratio as required by the Act. Prior to that there had been no compliance for 15 consecutive months. The evidence of the new ratio was brought out by counsel for the Liquor Licence Board in cross-examination and he stressed the coincidence of the change in the figures at the same time as the date of the issuance of the Notice of Proposal. The Appellant brought forth no supporting evidence such as daily record sheets or tapes. There was also the evidence of the investigator for the Liquor Licence Board that he had requested tapes but was told that the figures in the ledgers could not be verified because there were no daily cash register sheets or tapes. The Tribunal is concerned by the failure of the Appellant to produce evidence to show the daily figures and sales sheets in support of its contention that the ratio was now being met. The evidence also showed that the sale of food was restricted solely through a "pass through" from the snack bar kitchen which was served on paper plates and that there were no proper dining tables set up with tablecloths and cutlery. There was also no evidence before the Tribunal to indicate that the ratio would be complied with on a permanent basis and the Tribunal finds that compliance with the proper food/liquor ratios is still a very serious problem.

The Tribunal also finds that the applicant has not carried on its business in accordance with law as required by Section 6(1)(c)(ii) of the Liquor Licence Act because of its failure to meet the food/liquor ratio and because of the three prior convictions which are indications of the past conduct of the officers or directors of the applicant corporation. The Board was not satisfied with the manner in which the applicant had conducted itself in the operation of the dining lounge licence and there was no evidence before the Tribunal to justify it in reversing that finding.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 12th day of June, 1984, and directs the Board to set the date of commencement of the said "Term and Condition".

SALVATORE VALELA
(LICENSEE OF VIVA T.O. RESTAURANT)

APPEAL FROM A DECISION AND ORDER OF
THE LIQUOR LICENCE BOARD

TO ATTACH A TERM AND CONDITION TO THE
DINING LOUNGE LICENCE

TRIBUNAL: LACHLAN CATTANACH, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN MORNINGSTAR, MEMBER
R. CHEMIJ, MEMBER

COUNSEL: S.A. GRANNUM, representing the Respondent

No one appearing for the Appellant

DATE OF
HEARING: 12 February 1985 Toronto

DECISION AND ORDER

Upon reading the record of proceedings before the Board and upon hearing submissions by counsel for the Board, the Tribunal determines as follows:

1. The Appellant was given Appointment For and Notice of Adjourned Hearing the 7th day of February, 1985 as evidenced by Exhibit 4 which contains the Notice that the

> "hearing will proceed in accordance with the Appointment for and Notice of Hearing dated the 15th day of May, 1984"

which included the following Notice:

> "....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings.

2. The Appellant has not appeared.

BY VIRTUE OF THE AUTHORITY vested in it under Section 7 of the Statutory Powers Procedure Act and under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 13th day of March, 1984 and directs the Board to set the date of the commencement of the said "Term and Condition".

FIRST FEDERAL FINANCIAL SERVICES operated by
UPPER CANADA CREDIT CORPORATION

APPEAL FROM THE PROPOSAL OF
THE REGISTRAR OF MORTGAGE BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
F. THOMAS PEOTTO, MEMBER
ALEXANDER HETTMANN, MEMBER

COUNSEL: MORRIS GILBERT-FRIESNER, President, its Agent

A.N. MAJAINA, representing the Respondent

DATE OF
HEARING: 21 March, 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal finds that the Appellant was duly served with the Registrar's Amended Notice and Notice of Further Particulars dated 26 March, 1985.

The Tribunal finds the facts are as set out in the Notice of Proposal and the Amended Notice of Proposal.

The Tribunal further finds that the allegations set out therein have substance and are valid.

Accordingly, by virtue of the authority vested in it under the Mortgage Brokers Act, Section 7, the Tribunal directs the Registrar to carry out his Proposal and Amended Proposal to revoke the registration.

ROBERT L. BARTER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
J.T. HOGAN, MEMBER

COUNSEL: STEPHEN AUSTIN, representing the Respondent

No one appearing for the Appellant

DATE OF
HEARING: 5 June 1985 Toronto

REASONS FOR DECISION AND ORDER

The Appellant Robert L. Barter applied for registration as a motor vehicle salesperson by means of an application which has been filed herein as Exhibit 3 dated September 15th, 1984, on the standard form and in which he stated, inter alia, that he had a record of criminal convictions and was an undischarged bankrupt.

The Registrar proposed to refuse registration and cited Section 5 of the Motor Vehicle Dealers Act, R.S.O. 1980, as amended.

In his Reasons the Registrar quoted the aforementioned Section 5 of the Act and then went on to provide certain particulars - these had to do with the criminal convictions, as well as the circumstances and particulars of the bankruptcy.

The Appellant appealed to this Tribunal from such Proposal but failed to appear on the day fixed for the hearing of his appeal, notwithstanding that he had been duly and properly served as appears from the Proof of Service filed herein as Exhibit 1.

The Tribunal is of the opinion that the Registrar's Proposal is justified and ought to be upheld.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

PAUL R. BURKE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA J. SHAND, MEMBER
ROSS A. WEMP, MEMBER

COUNSEL: W. GERALD PUNNETT, representing the Appellant

A. N. MAJAINA, representing the Respondent

DATE OF
HEARING: 27 June 1985 Guelph

REASONS FOR DECISION AND ORDER

The Appellant, Paul R. Burke, has appealed from a Proposal of the Registrar of Motor Vehicle Dealers to refuse him registration as a motor vehicle salesman. The Registrar relies on Section 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299.

Particulars of the Registrar's reasons for his proposal are set out in pages 2, 3, 4 and 5 of that document. Essentially these consist of the alleged fact that in the application for the registration sought, the Appellant made less than full disclosure of his criminal record and also that such criminal record does exist.

The convictions include two for "assault causing bodily harm". Apart from the alleged non-disclosure which we deem a secondary consideration in this case and which need not be the primary basis of our decision, the Tribunal considers that these two convictions as well as the other convictions sufficiently serious to justify the Registrar's Proposal and his concern as to the Appellant's fitness for the registration sought which underlies it. It seems from the evidence led at the hearing that the Appellant's driving licence has been under suspension for most of the past 6 or 7 years and, in particular, during the time he was employed by the motor vehicle dealership which was the proposed employer.

It has been the experience of the Tribunal that where there has been a record of criminal convictions in respect to the past conduct of an applicant for a motor vehicle salesman's registration and where the Registrar of Motor Vehicle Dealers and Salesmen, having reviewed such application and taken exception to such record on the grounds that such convictions are germane to the registration sought and the activities which would thereby be licensed, and where the Tribunal has substituted its opinion for that of the Registrar and reached a conclusion opposite to that achieved by the Registrar, the Divisional Court in exercise of its superior jurisdiction, is prone to restore the decision of the Registrar.

The Divisional Court in its past review of the decisions of this Tribunal has taken a very uncharitable view towards crimes of violence in assessing the fitness of applicants for registration in this industry.

We are bound to share that view which has also been that of the Registrar of Motor Vehicle Dealers.

The evidence in this case has been strong and persuasive and sufficient to convince us that (notwithstanding the absence of any evidence of theft or fraud) on the basis of the decided cases as well as on the merits of this case, the Appeal must fail and the Registrar's decision be upheld.

The Tribunal holds as finding a fact that the past conduct of the Appellant affords reasonable grounds for the belief that if registered he would not carry on business in accordance with law, and with integrity and honesty. And in this respect we make specific reference to his demonstrated disregard for law in many instances and we use the word "honesty" in the sense that it implies the duty of any citizen to obey the law.

We remind the Appellant of the Provisions of Section 8 of the Act, which read:

> "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal and Refuse to Grant Registration to the Appellant as a Motor Vehicle Salesman.

552484 ONTARIO LIMITED operating as
MAGNUM AUTO SALES
and
EDWARD WILLIAM CRAIG

APPEAL FROM A DECISION OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
F. THOMAS PEOTTO, MEMBER
WILLIAM DALGLISH, MEMBER

COUNSEL: ROBERT STANLEY, agent representing the Appellants

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 5 December 1984 London

REASONS FOR DECISION AND ORDER

The Appellants 552484 Ontario Limited operating as Magnum Auto Sales, and Edward William Craig, had been registered respectively as a motor vehicle dealer and as a motor vehicle salesman and the purpose of this hearing was to consider their appeal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke such registrations for the reasons set forth in that Proposal which are to be found on page 2 of the same which has been entered as Exhibit 3 to these proceedings and read as follows:

> I. In my opinion, the Company's registration should be revoked as the past conduct of its officer and director affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
>
> II. The Company is in breach of a term or condition of its registration;

> III. In my opinion, the Registrant's registration [i.e., that of Edward William Craig] should be revoked as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Section 5(1) of the Motor Vehicle Dealers Act reads in part as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
>
> (c) the applicant is a corporation and,
>
> (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

There were a number of specific allegations of wrong-doing by the Appellants set forth in the Proposal and subsequently referred to and gone into at length in the evidence submitted by the Respondent. Among other things it was alleged that the application for dealership registration made by the Corporate Appellant and signed by Eileen Craig, the wife of Edward William Craig, the other Appellant, contained false and misleading statements which were intended to mislead and deceive the Registrar and/or his staff, which did, in fact mislead and deceive him or them so that the registrations in question were granted when otherwise they would not have been granted. It was alleged that the provisions of Section 3(3) of the Act and that Sections 13(3) and (4), and 18(1) of the Regulations under the Act had been breached and that this constituted grounds for the implementation of the provisions of Section 5 referred to.

Without exhaustively reviewing the evidence in all its detail the Tribunal has unanimously reached the conclusion that the Respondent Registrar has established his case.

And yet the Tribunal is exceedingly reluctant to impose the full severity of the Proposal before it because of a number of factors which it thinks should be taken into consideration in the Appellant's favour.

Firstly, there has been no evidence or, so far as the Tribunal is aware, any suggestion that members of the public were cheated by the Appellants or provided with fraudulently defective or unsatisfactory goods notwithstanding that a substantial number of motor vehicles were sold during the currency of these Registrations.

Secondly, the Appellant Edward William Craig, who appears to have been at all material times the driving force behind the corporate Appellant as well, has a number of features which either were of a redeeming nature or compel the Tribunal's sympathy. That is to say, he has been engaged most of his productive life in the auto industry, either as an auto mechanic or salesman and presumably this is his one and principal vocation or area of competence. He has been housing and supporting an impressive number of dependents, some of whom are completing their education as the result of his ability to do this. He is a man who apparently accepts rather than shirks his responsibilities in life, for example, he has bought and paid for his home; he built, established and for 5 years maintained a motor vehicle repair business and when the latter failed shortly before the subject dealership business was begun, he paid off his creditors with the proceeds of the sale of the business instead of going into bankruptcy as so many people seem to do these days in similiar circumstances.

In short, while the Tribunal is unable to reject the Registrar's case, which has been supported by very fulsome evidence, especially in respect to the Application for Registration executed on behalf of the Corporate Registrant, it is not possible to say that Mr. Craig's record in life is totally without integrity and at times it appears that he has demonstrated a lot of integrity.

Therefore, while the Tribunal is unable to order the Registrar to reverse his Proposal, and, on the basis of the law as it stands which also limits the Tribunal's jurisdiction, and pursuant to the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal Orders and Directs the Registrar to revoke both registrations - but to do so strictly in accordance both with the provisions as well as the spirit and intent of Section 8 of the Motor Vehicle Dealers Act, which reads:

> A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Specifically, the Tribunal directs the Registrar to re-register the Appellants immediately and without delay as soon as they have demonstrated that the various objections referred to in evidence at this Hearing have been overcome and including the relocation of the business to suitable premises in compliance with the Sections of the Regulations hereinbefore quoted.

DAVID N. GRANGER AND DONALD K. LEE
operating as RIDGEWAY AUTO SALES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATIONS AS
MOTOR VEHICLE DEALER AND AS MOTOR VEHICLE SALESMEN

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
DR. STUART ROSENBERG, MEMBER
DAVID BAKER, MEMBER

COUNSEL: STANLEY J. POTTER, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 26 August 1985 Toronto

REASONS FOR DECISION AND ORDER

The Appellants David N. Granger and Donald K. Lee had formed a partnership styled Ridgeway Auto Sales. Lee and Granger applied individually for registration as motor vehicle salesmen. As partners they also applied on behalf of the partnership Ridgeway Auto Sales for registration as a motor vehicle dealer.

Section 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980 Chapter 299 provides:

> An applicant is entitled to registration or renewal of registration except where,
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

Section 7(1) of the Motor Vehicle Dealers Act provides:

> Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

The Respondent Registrar took exception to these applications and issued a Notice of Proposal which reads at page 3 under the heading "Reasons" as follows:

> 1. In my opinion Ridgeway is not entitled to registration under Section 5 of the Act as the past conduct of Lee and Granger affords reasonable grounds for belief that they will not carry on business in accordance with law and with integrity and honesty.
>
> 2. In my opinion Lee is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.
>
> 3. In my opinion Granger is not entitled to registration under Section 5 of the Act as his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Under the heading of "Particulars" it was further alleged as follows:

> 1. On or about January 2, 1985, Granger and Lee submitted an Application for Business Registration, dated January 9, 1985, to the Ministry of Consumer and Commercial Relations (the "Ministry") for registration as a motor vehicle dealer c.o.b. under the partnership name of Ridgeway.

2. On or about January 2, 1985, Granger submitted an Application for Employee Registration, dated January 9, 1985, to the Ministry for registration as a motor vehicle salesman.

3. On or about January 2, 1985, Lee submitted an Application for Employee Registration, dated January 9, 1985, to the Ministry for registration as a motor vehicle salesman.

4. Lee and Granger have records of conviction for criminal offences which relate to their fitness for registration under the Act.

5. Lee and Granger furnished false information on their applications for registration and in the application for registration of Ridgeway by failing to disclose that they had criminal records.

6. On the application for registration of Granger, he answered "NO" to Question 7 which states:

> Has the applicant ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet. NOTE: Where the applicant has previously been registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any conviction in respect of which a pardon has been granted.

7. Information subsequently obtained reveal that Granger, in fact, has a record of criminal convictions as follows:

(i) June 20, 1969 - ATTEMPT ROBBERY, for which he received a suspended sentence and probation for two years.

(ii) (1) Jan. 21, 1971 ATTEMPT B & E WITH INTENT, for which he was sentenced to incarceration for a period of six months.

(ii) (2) Jan. 21, 1971 B & E & THEFT (2 charges) for which he was sentenced to a period of incarceration for three months definite and six months indefinite on each charge concurrent but consecutive to count #1.

(iii) March 29, 1979 - THEFT UNDER $200 for which he was fined $200 or a period of incarceration for ten days, in default;

(iv) January 3, 1980 - THEFT UNDER $200 for which he was fined $100 or a period of incarceration for seven days, in default, and probation for six months.

6. On the application for registration of Lee, he answered "NO" to Question 7 which states:

> Has the applicant ever been convicted under any law of any country, or state, or province thereof, of an offence, or are there any proceedings now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet. NOTE: Where the applicant has previously been registered, list only those convictions which have occurred since the date of last filing. You are not required to disclose any conviction in respect of which a pardon has been granted.

7. Information subsequently obtained revealed that Lee, in fact, has a record of criminal convictions as follows:

(i) August 1, 1979 - THEFT UNDER $200 for which he was fined $150 or a period of incarceration for fifteen days, in default;

(ii) Jan. 4, 1980 B & E & THEFT (2 charges) for which he was sentenced to a period of incarceration for two days and fined $250 or a further period of incarceration for two months, in default; B & E & THEFT for which he was sentenced to a period of incarceration of one day and fined $250 or a further period of incarceration for two months, consecutively, in default; POSSESSION OF STOLEN PROPERTY OVER $200 for which he was sentenced to a period of incarceration of one day and fined $250 or a further period of incarceration for two months, consecutively, in default;

(iii) September 10, 1980 - DANGEROUS DRIVING for which he was fined $200 or a period of incarceration for thirty days, in default; (2) ASSAULT WITH INTENT TO RESIST ARREST for which he received a suspended sentence and probation for a period of one year;

(iv) May 4, 1981 - THEFT UNDER $200 for which he was sentenced to a period of incarceration for one month and probation for a period of one year; (2) THEFT UNDER $200 (2 charges) for which he was sentenced to a period of incarceration for one month on each charge consecutive and consecutive (sic); (3) THEFT OVER $200 (3 charges) for which he was sentenced to a period of incarceration of one month on each charge consecutive and consecutive (sic);

(i) May 5, 1981 - DANGEROUS DRIVING, for which he was sentenced to a period of incarceration of thirty days consecutive to the sentence that was presently being served.

10. On the application for registration, Lee answered "YES" to question 4(b) which states:

> Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body."

The particulars given in response to this question were

> IMPAIRED DRIVING MAY 1st, 1980.

11. On the application for registration of Ridgeway, Lee and Granger answered "NO" to question 7, which has already been referred to herein. However, in response to question 3(b) thereof which states:

> Have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body."

Lee and Granger responded "YES" with the particulars that

DON LEE DRIVERS LICENCE MAY 1/80 IMPAIRED DRIVING.

12. On or about February 25, 1985, Lee and Granger met with the Registrar in order to discuss the responses given in the applications for registration. At this time, Lee and Granger were unable to provide the Registrar with a satisfactory explanation for failing to disclose their criminal records.

The Tribunal holds that the foregoing is a substantially accurate recital of the facts as proven in evidence before us during the course of this hearing and in particular that negative responses were given in each of the applications where the same required particulars of past criminal convictions of the applicants.

The Tribunal holds that these false answers were quite probably given with the intention of deceiving the Registrar. The Tribunal shares the serious view taken by the Registrar of these false answers and the underlying motive for this which we perceive in common with him. The Tribunal shares the Registrar's conclusion as to the effect of such false answers upon the operation of section 5(1)(b) of the Motor Vehicle Dealers Act. That is to say, the fact that such false answers were given in each case affords reasonable grounds for belief that the applicants will not carry on business in accordance with law and with integrity and honesty if registered.

Furthermore, the offences themselves in respect of which the convictions were entered also afford the grounds for the same belief which the Tribunal shares with the Registrar notwithstanding that some of these convictions were entered when the Appellants were much younger because since, at least in the case of Mr. Granger, there has been a continuing, ongoing succession of convictions right up to 1980. (It may be mentioned parenthetically that in the case of Lee the offences, had they occurred in the aftermath of the Young Offender's Act, might not be before us at all).

The key words in the relative section of the Motor Vehicle Dealer's Act, that is to say section 5 above quoted, are "honesty" and "integrity". Members of the public are entitled to the assurance that salespersons with whom they have been dealing in these very serious transactions (often involving technical and other considerations beyond the scope of their own knowledge and experience) as well as the employers and principals of such salespersons shall be strictly and scrupulously honest.

This is fundamentally important and moreover what the law demands. It is our duty as well as that of the Registrar to enforce that law.

The Tribunal is not convinced having heard this appeal that it should overrule the Registrar having regard to his concerns. Fortunately our society and the economy of our society offer other opportunities to these Appellants to earn an honest livelihood and to establish and demonstrate a record of honesty and integrity over an appropriate and reasonable period of time such as might satisfy the purpose and intent of Section 8 of the Act which reads:

> A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

In the meantime the Proposal of the Registrar shall be upheld. Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal and refuse the registrations sought.

DAVID S. LEONARD

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
BARBARA SHAND, MEMBER
J. T. HOGAN, MEMBER

COUNSEL: HAROLD MATTSON, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF HEARING: 20 March 1985 Toronto

REASONS FOR DECISION AND ORDER

In the application form which is the basis of this hearing, the Applicant did not answer question No. 7 correctly - he failed to disclose that he had been charged with four counts of fraud.

The Tribunal is on record time and again as to the importance of the application being answered correctly, in that the same forms the basis for the exercise by the Registrar of his judgment. Based on its analysis in individual situations, the Tribunal has time and time again upheld the Registrar's position in the Notice of Proposal in these matters. But it does not follow that the incorrect application automatically leads to disentitlement; there is still the exercise of judgment with respect thereto.

The Applicant has given an explanation of the reasons for the incorrect answer; namely, having completed Question No. 4 and not having read Question No. 7 in its entirety, he committed what he calls "an honest, human error". The Tribunal reiterates its position that a grave responsibility lies upon the Applicant to complete the application correctly; the Tribunal, in this instance, accepts the explanation of the Appellant.

Further, the Registrar forthrightly stated that he was influenced by the fact (as is set out in the Notice of Proposal) that the Applicant

> "in addition....admitted that he had failed to make any payments to Sonatex Knitting Mills Incorporated, which conduct resulted in the laying of the above-mentioned charges."

The Tribunal is of the opinion that that matter should not (at that point of time) have been taken into consideration by the Registrar. The merits of that matter is yet to be decided.

The Tribunal finds in this instance in respect of the incorrectness of the application form, that such past conduct of the applicant does not afford reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty, and in this regard the Tribunal substitutes its opinion for that of the Registrar.

Accordingly, the Tribunal directs the Registrar to refrain from carrying out his proposal and to grant registration to the Appellant.

This decision is not to be taken as precluding any action which the Registrar may be entitled to take after other proceedings are concluded.

BRIAN F. SUNDERLAND

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE THE REGISTRATION AS MOTOR VEHICLE SALESMAN

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
BARBARA SHAND, MEMBER
PETER BURDON, MEMBER

COUNSEL: BRIAN F. SUNDERLAND, appearing in person

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 3 July 1985 Toronto

REASONS FOR DECISION AND ORDER

This was an appeal from a decision of the Registrar of the Motor Vehicle Dealers and Salesmen to refuse registration to the Appellant, Brian F. Sunderland, pursuant to his Notice of Proposal which was based on the provisions of section 6(1) and 5(1)(b) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 which said sections read in part as follows:

> 6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
>
> 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> > (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty....

The Notice of Proposal specifies the particulars of the Registrar's concern underlying his proposal to refuse registration. These are to be found at pages 2, 3, and 4 of the Proposal, filed as Exhibit 5, and read in part as follows:

> 1. The Applicant was previously registered as a motor vehicle salesman under the Act....
>
> 2. In his application for registration dated the 13th day of September, 1983, the Applicant furnished false information....
>
> 3. The Applicant failed to disclose the following criminal record:
>
>   (1) March 10, 1969 [when he was aged 17], Take Auto Without Consent, for which he received a suspended sentence of two years probation;
>
>   (2) July 11, 1974, Possession of a Narcotic contrary to section 3(1) of the Narcotics Control Act, for which he was fined $35.00 or in default seven days incarceration;
>
>   (3) January 29, 1980, Dangerous Driving....fined $250.00...
>
> 4. As a result of the false information furnished by the Applicant in the above mentioned application for registration the applicant was registered on or about the 11th day of September, 1983.
>
> 5. As a result of the conviction eluded (sic) to in paragraph 8 herein, and the attendant period of incarceration his former employer terminated the employment of the Applicant as a motor vehicle salesman on or about the 27th day of February, 1984 by notification to the Registrar dated the 14th day of March, 1984.
>
> 6. On or about the 20th day of November, 1984, the Applicant made a further application for registration as a motor vehicle salesman under the Act. The date of the application for registration was the 30th day of October, 1984.
>
> 7. In response to question number 7 contained therein (Have you ever been [criminally] convicted....or are there any proceedings now pending?) the Applicant responded: "Yes"....

8. Contrary to the instructions provided in question 7 of the application of registration, the Applicant failed to give full particulars of all convictions and proceedings on a separate sheet. In fact, on or about the 27th day of February, 1984, the Applicant was convicted of Conspiring to Traffic in Narcotics for which he received incarceration for a period of four years.

9. The Applicant is presently still serving his sentence and is residing in a halfway house in Ottawa, Ontario.

10. In or about the month of December 1984, the Registrar spoke with the Applicant by telephone in order to discuss the above-noted allegations. [The preceding sentence was amended at the hearing.] The Applicant stated as his reason for failing to disclose the details of his criminal record in his application for registration dated the 13th day of September, 1983 that "he didn't want the other staff at the dealership to be aware of his record." The Applicant also acknowledged that the dealer/ principal which had employed him as a motor vehicle salesman had a right to be aware of the fact that he had a criminal record and the details thereof.

Charges were pending when the original application, that of September 13, 1983, was made. These related to a very serious conspiracy to traffic in a large quantity of the narcotic cocaine to the value of some $90,000 and which resulted in the criminal conviction and a sentence of four years imprisonment referred to in paragraph 8, above.

In the opinion of the Tribunal, both the original and current applications were unsatisfactory and the Registrar's concern and his dissatisfaction with them are justified. We agree that an element of deceit and willful intention to deceive was present, certainly in the original application, that dated September 13, 1983. We take a serious view of this. We agree with the Registrar that the past conduct of the Appellant, both in respect to his applications as filed and in respect of the crimes for which he was convicted, affords reasonable grounds for belief that he will not carry on business in accordance with the law, and with integrity and honesty as contemplated by section 5.

However, Mr. Sunderland has a number of positive things operating in his favour. He is still young enough that considerable hope for reform may reasonably be felt. This appears to be the feeling of his present employer as well as that of the parole board and others who have written letters on his behalf and he also has family support.

We feel Mr. Sunderland's present employment as a service advisor in a motor car dealership, which seems to be assured to him for some time in the future, offers an excellent opportunity for him to demonstrate, as time passes, that he has achieved a degree of rehabilitation, possibly sufficient to build up a record of past conduct sufficiently good as to possibly outweigh the negative record of past conduct which has been demonstrated.

The prospect for improvement in Mr. Sunderland's position and for his suitability for consideration for registration at a date somewhere in the future, depending upon the circumstances in which he achieves the expiration of his parole and his employment record in the interim, appears extremely hopeful.

Therefore the provision of section 8, which reads

> A further application for registration may
> be made upon new or other evidence or
> where it is clear that material
> circumstances have changed

offers every hope that at a future time a further application for registration may be made by Mr. Sunderland and made with optimism.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal and refuse registration for the present but subject to the foregoing reasons.

BELPARK HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
LOUIS A. RICE, MEMBER

APPEARANCES:

STEVEN WESFIELD, representing the Registrar under the Ontario New Home Warranties Plan Act

No one appearing for the Applicant

DATE OF HEARING: 16 December 1985 Toronto

REASONS FOR DECISION AND ORDER

The Registrar's proposal is a proposal to revoke the registration of the Applicant registrant on grounds set out in the Notice of such proposal which read as follows:

REASONS:

1. Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, you have a record of breaches of warranty
TO WIT:

> In the period April 1, 1984 to March 31, 1985, two conciliations were processed on homes sold by you. The conciliation reports confirmed the purchasers' warranty claims, that you had not rectified valid warranty matters although requested to do so.

2. The Program invoiced you for one excessive conciliation, pursuant to Regulation 726, Schedule A-4. You have received the conciliation report, request to perform conciliation fee invoice, but have failed to act.

In the absence of the Applicant registrant who had requested this hearing of his appeal from such proposal and yet failed to appear, although duly served with an Appointment for and Notice of Hearing, the Registrar adduced evidence upon which the Tribunal is persuaded that the Registrar's proposal is based on good and sufficient grounds and ought therefore to be implemented.

The Registrant has demonstrated a willful inclination to disregard his obligations under the Act and under his agreement with the Warranty Program amounting to disdain and this sort of conduct cannot be encouraged.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his proposal.

LUCIANO AND NICOLE CALLEGARI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
BARBARA NICHOLS, MEMBER
REGINALD MARTIN, MEMBER

COUNSEL: LUCIANO CALLEGARI, appearing in person

BRIAN W. CHU, representing the Respondent

DATE OF
HEARING: 27 August 1985 Timmins

REASONS FOR DECISION AND ORDER

This has been a hearing held in the city of Timmins, Ontario pursuant to section 16 of the Ontario New Home Warranties Plan Act. We have come here to consider a claim brought under section 13 of the Act. The claim has been properly brought in respect of the formal requirements as to notice of claim. However, the Tribunal can only order the relief sought, thereby reversing the decision of the Warranty Program, if it can be demonstrated the appellants' problem is covered by the warranty provided by the Act; that is to say, unless the problems complained of are warranted under the Act. The warranty described is set forth in section 13(1)(a)(i)(ii) and (iii) of the Ontario New Home Warranties Plan Act.

The section goes on in its second subsection to set forth certain exclusions. These exclusions include "normal shrinkage of materials caused by drying after construction" and "damage resulting from improper maintenance".

The problem in this case is one of certain cracks in or around the brick veneer or cladding on the outer surface of the appellants' home. The issue for the Tribunal to decide is whether or not the warranty provided by the Act covers or otherwise applies to such problems.

Essentially, our task is to decide whether the word "normal", which is a word which rather conspicuously appears in section 13(2)(d), has application in this case or not. If the shrinking is not "normal" it is "abnormal". If it is "abnormal" then it is not excluded from the warranty. Therefore, in trying to decide a case such as the one that is presently before us, the Tribunal must decide if the shrinking has been "normal" or "abnormal".

The Tribunal holds that this is a perfectly proper one year claim brought within one year of the date of possession which was April 24, 1984. There was no problem as to adequacy or sufficiency of notice or in respect to the time factor. The only question to be determined therefore is whether these small cracks in the masonry - hairline cracks - which we are satisfied are due to shrinking caused by drying after construction, are to be considered "abnormal" - i.e., warranted - or not. Bearing in mind all the factors which are relevant to our determination as well as the language of the Statute, specifically section 13(2), we are unable to avoid the conclusion that these cracks, distressing as they may be to Mr. and Mrs. Callegari, first time home owners and undoubtedly very proud of their new home and anxious to enjoy it to the full, are nonetheless not to be deemed exceptionable or "abnormal". They are regrettable but they are not, in the opinion of the Tribunal, beyond the contemplated exclusions specifically set out in the Act.

Therefore this claim must fail.

By virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

CARLETON CONDOMINIUM CORPORATION NO. 177

APPEAL FROM THE DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: JAMES A. TACKABERRY, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF
HEARING: 14 November 1984 Toronto

REASONS FOR DECISION AND ORDER

The Appellant's evidence consisted of certain engineer's reports, or professional reports in writing, which tended to demonstrate cracking in foundation walls or, generally, certain defects in respect of which relief pursuant to the provisions of the Ontario New Home Warranty Plan Act might be available to it. But the authors of these reports, documents in writing, were not present nor was any witness called or available at the hearing to be called on behalf of the Appellant.

Counsel for the Appellant was not competent to give evidence nor was that his function.

The Respondent moved for a non-suit on the grounds, inter alia, that the Appellant had failed to make out a prima facie case sufficient to oblige the Respondent to bring evidence in rebuttal. The Respondent said that its witnesses were not present in the hearing room in order to give evidence to prove the case of the Appellant - that was not their function.

With this latter submission the Tribunal is in agreement.

The Tribunal considers that the nub of the issue before it - the issue underlying the Respondent's motion for non-suit - is whether a Respondent, someone against whom liability in damages is imputed, can be found liable on the basis of documentary opinion evidence in respect of which no opportunity is afforded that person for cross-examination.

It may be that a situation could or might conceivably exist where that was possible. But generally, and in our view in the circumstances of the present case, the principle of natural justice would be offended were we to refuse the Respondent's motion and proceed without any cross-examination or without allowing or providing for any cross-examination upon the Appellant's evidence.

In the circumstances, and pursuant to and by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JOSEPH CIARDULLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM.

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
WATSON W. EVANS, MEMBER
D. H. MACFARLANE, MEMBER

COUNSEL: GLENN R. SOLOMON, representing the Appellant

BRIAN W. CHU, representing the Respondent

DATE OF HEARING: 24 July 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has reached a decision in respect to the Motion set before us by counsel for the Appellant.

The principal issue arising from the Motion brought before the Tribunal by counsel for the Appellant is the question of *res judicata*, that is to say, of whether the Judgement of the Honourable Judge Trotter of the District Court of the Judicial District of York is or is not binding on the Warranty Program by operation of that principle of *res judicata* or whether, in the alternative, it is not binding upon the Warranty Program because the latter was not a party to the proceedings from which the decision resulted and because the only parties that would be affected by such a judgement would be the parties to the proceedings which resulted in that judgement or otherwise.

In the opinion of the Tribunal the point is one of considerable nicety and it is certainly an important one. We feel that it would be a very good thing if whatever decision were achieved by the Tribunal were subjected to the refining and beneficial process of judicial review. Of course, the Tribunal cannot impose any requirement that its decision be judicially reviewed. It can, however, express the opinion that a judicial review would be of value not only to the public at large but to the Tribunal whenever it may in future be called upon to make a similar decision.

On the basis of the representations which have been made to the Tribunal this morning and upon a review of the materials, scanty as they may be, which have been set before us the Tribunal is of the opinion that the question of the liability of the builder or builders has been settled and determined by the Judgement of the Honourable Judge Trotter. The Tribunal holds that by virtue of that Judgement and by operation of the principle of res judicata the Warranty Program must be deemed (as inheritor of the liability of the builder(s) by operation of law) liable to the Appellant in the amount of $5,000. which was the amount claimed in the Statement of Claim and allowed in the judgement.

This decision in respect to the Motion set before it is the unamimous decision of the Tribunal.

COURTYARD HOMES LTD

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman
F. THOMAS PEOTTO, Member
D. H. MACFARLANE, Member

COUNSEL: BRIAN M. CAMPBELL, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 21 August 1985 Toronto

DECISION AND ORDER

The Tribunal determines as follows:

1. The Appellant was sent by registered mail the Appointment for and Notice of Hearing the 23rd day of April, 1985 as evidenced by Exhibit 2, which stated:

> ....hearing will be held....before the Commercial Registration Appeal Tribunal in the Tribunal's chambers, 1 St Clair Avenue West, Toronto on Wednesday, the 21st day of August, 1985 at 9:30 o'clock in the forenoon...."

which contains the further notice:

> "....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal.

KATHRYN EDERY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman
F. THOMAS PEOTTO, Member
D.H. MACFARLANE, Member

COUNSEL: KATHRYN EDERY, appearing in person

ROBERT HARRISON and
BRIAN W. CHU, representing the Respondent

DATE OF
HEARING: 25 July 1985 Toronto

REASONS FOR DECISION AND ORDER

In the opinion of the Tribunal, the cracks in the basement wall and referred to in evidence are not a major structural defect as defined in Regulations to the Statute nor are those cracks caused by any major structural defect as so defined.

The clay brick on which the steel beam is resting is not a proper support or supporting member such as to comply with the Ontario Building Code. The absence of such a proper provision for the support of this beam constitutes, in the opinion of the Tribunal, a major structural defect. This situation, which the builder has already undertaken to remedy, should be remedied and the Warranty Program should oversee this. It is not unreasonable that the owner Mrs. Edery should be present if she wishes or some person as her representative. The Warranty Program is hereby directed to oversee the proper rectification of the steel beam problem referred to and, within reasonable limits, at a time convenient to both parties, both the owner as well as the builder. The Tribunal also holds that the missing drywall was removed in order to facilitate the inspection of the beam and that the drywall and insulation must also be properly reinstalled, again under the supervision of the Warranty Program.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to rectify or supervise the rectification of the supporting beam pocket, relating to the steel beam referred to in the evidence and to replace dry wall and insulation also referred to in the evidence.

FRANK HODGES

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
JOHN C. HURLBURT, MEMBER

COUNSEL: FRANK HODGES, appearing in person

CAROL STREET, representing the Respondent

DATE OF
HEARING: 17 September 1985 Toronto

REASONS FOR DECISION AND ORDER

This was a claim in respect of certain cracks in the Appellant's basement wall. At times substantial quantities of water entered the basement making the basement impossible to use for its normal purposes which included use as play space for a young child. However, there was no evidence that the house as a whole was uninhabitable. Precedent, by which the Tribunal governs itself, requires the house in its entirety, not just in part, to be uninhabitable (i.e., unfit for the purpose for which it was intended) in order for a claim brought beyond the first year, a claim for a major structural defect as defined, to succeed.

Similarly the other criteria for a major structural defect which are defined in the Regulations to the Statute are not met either.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MARMION BUILDING CORPORATION
AND
TRI-M CONSTRUCTION

APPEAL FROM A DECISION OF THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATIONS

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: BRIAN M. CAMPBELL, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 19 November 1984 Toronto

REASONS FOR DECISION AND ORDER

The Respondent's Proposals were (Exhibit 9A) to revoke the registration of Marmion Building Corporation and (Exhibit 9B) to revoke that of Tri-M Construction Ltd., in each case pursuant to Section 8(2) of the Ontario New Home Warranties Plan Act which reads as follows:

> Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if he were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 7 referred to above reads in relevant part as follows:

> 7.-(1) An applicant is entitled to registration by the Registrar except where,
>
> (c) the applicant is a corporation and,
>
> (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;...

The principal or sole officer, director and shareholder of both the Appellant Corporations was an individual named Morris Rosen. It is Morris Rosen with whom we are primarily concerned in this decision rather than any corporate cloaks in which he may appear from time to time now or in the future. Thus, in this decision, the words "Appellants" or "Appellant" really relate to Morris Rosen, the living and controlling entity behind the corporate inventions through which he operated and this should be borne in mind for the sake of clarity.

Mr. Rosen, in the exercise of his right to appeal the Proposals, requested this Hearing. The Respondent accordingly prepared a really quite vast volume of evidence, mostly contracts entered into by Rosen's companies or correspondence between himself or his solicitors and others, with which he would have been probably more familiar than anyone else, and as well the Respondent subpoened a large number of witnesses who also appeared, no doubt at considerable inconvenience, at the start of the Hearing; but Mr. Rosen did not appear. Instead the Appellants were represented by counsel, Mr. Adrian Hill, who appeared to have not been adequately briefed although he had been on the record as solicitor for the Appellant for some months previously. Mr. Hill submitted that he was not familiar with the facts of the case (to which the Respondent's documentary evidence related) and requested an adjournment to enable him to prepare. He also spoke of the limitation or insufficiency of his retainer or its terms and stated that he was instructed to walk out if no adjournment were granted. He had been retained to seek an adjournment and no more. In view of the large number of witnesses gathered and the non-attendance of Rosen himself, his motion or request was denied by the unanimous decision of the Tribunal. Mr. Hill then withdrew. As the Respondent's evidence proceeded the Tribunal's view was confirmed that the refusal of the requested adjournment had been entirely proper.

The Hearing proceeded. It seems that the Appellants (in all or most instances "Marmion Construction carrying on business as Tri-M Homes, Markham Village") entered into 22 contracts being standard Agreements of Purchase and Sale for the provision of new houses with 22 individuals or pairs of individuals. (The majority of these purchasers appear to have been young couples buying homes for the first time.) Construction of the houses had not been started when any of the contracts were signed (nor indeed were they ever started) but in each case a date was fixed for completion and delivery of possession and in each case (with one exception) a deposit of $10,000 was made by the purchasers to a total of $210,000.

Each of the Agreements of Purchase and Sale (at paragraph 3(a)) made provision for reasonable extensions of the closing date provided there was no wilful or unreasonable neglect on the part of the vendor. (Emphasis added)

The closing dates designated in each of the contracts came and went. In each case the vendor exercised his privilege to extend the date for closing. The first unilateral extension (in most or all the cases) was to August 30th, 1983. (There had been an extension by agreement in some cases prior to this.) This was followed by a further unilateral extension to December 29th, 1983 and finally from that date to June 29th, 1984. These announcements of extension of the dates fixed for closing were made by letter addressed to the purchasers or their conveyancing solicitors and offered very little information or explanation and no option. Here are some typical examples (See Exhibit 19, Tabs 5, 19 and 13):

(TAB 5)

GOLDMAN, SPRING
Barristers and Solicitors

June 7, 1983

Sheldon L. Sherman
Barrister & Solicitor
Suite 1
2645 Eglinton Ave. E.
Scarborough, Ontario
M1K 2S2

Dear Mr. Sherman:

Re: Tri-M Homes
Sale to West

We are the solicitors for the vendor in the above-noted transaction.

This is to inform you that due to construction delays and pursuant to paragraph 3(a) of the Agreement of Purchase and Sale, the closing date in this transaction is hereby extended to August 30, 1983.

Yours very truly,

GOLDMAN, SPRING

"S. Kichler"
Steven A. Kichler

(TAB 9)

GOLDMAN, SPRING
Barristers and Solicitors

August 10, 1983

Sheldon L. Sherman
Barrister & Solicitor
Suite 1
2645 Eglington Ave. E.
Scarborough, Ontario
M1K 2S2

Dear Mr. Sherman:

Re: Tri-M Homes
Sale to West

This letter is to inform you that the closing date in this transaction is being extended to December 29, 1983 for the following reason.

The Vendor is currently encountering problems between itself and the subdivider from whom it has purchased the subject property and consequently the Vendor is presently involved in litigation with the subdivider in order to resolve the matter.

Therefore for reasons beyond its control, the Vendor is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.

Yours very truly,

GOLDMAN, SPRING

"S. Kichler"
Steven A. Kichler

(TAB 13)

MARMION BUILDING CORPORATION
103 DENISON STREET, UNIT NO. 3, MARKHAM, ONTARIO L3R 1B5

December 1, 1983

Sheldon L. Sherman, Barrister
Suite 1
2645 Eglington Ave. E.
Scarborough, Ontario

Dear Sir:

Re: Tri-M Homes, Markham Village
Sale to West

This letter is to inform you that the closing date in this transaction is being extended to June 29, 1984 for the following reason.

Marmion Building Corporation is currently encountering problems between itself and the subdivider from whom it has purchased the subject property and consequently Marmion Building Corporation as Vendor is presently involved in litigation with the subdivider in order to resolve the matter. The subdivider is presently in receivership and is being represented by the Clarkson Company in behalf of the Bank of Commerce.

Therefore for reasons beyond our control, Marmion Building Corporation as Vendor is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.

Yours Truly,

Moe Rosen
President

Resulting from these extensions and the failure of the vendor to provide the new homes contracted for, dislocation and inconvenience to the purchasers occurred on a grand scale. Some who were previous homeowners had sold and been obliged to vacate their previous homes and were living with parents or in-laws often in very stressful circumstances. At least one couple's lives were further complicated, we were told, in the midst of this by pregnancy.

The following extracts of letters speak for themselves by way of illustration:

> (Exhibit 14, Tab 2: Extract)
> Re: Cheung purchase from Tri-M Homes
> Sawyer Crescent Markham, Ontario
>
> . . .
>
> With respect to the above-noted transaction and with respect to the telephone conversations we have had with your office, would you kindly advise us whether or not this transaction will close on the 30th of April, 1982. Please be advised that our client now works in Toronto but currently resides in London, Ontario. He therefore desires to complete the transaction as soon as possible because of the great inconvenience occassioned (sic) to him by having to commute from London to Toronto on a daily basis.
>
> . . .
>
> You are hereby put on notice that undo extensions create serious hardship for our client and if he is expected to enjure (sic) these then the least that he is entitled to is reasonable explanations from your client.
>
> Yours very truly,
>
> KAN, MARK & POON
>
> Per:
>
> J. LESTER DAVIES

(Exhibit 17, Tab 4: Extract)

August 17, 1983

Without Prejudice

Mr. Moe Rosen
c/o Trim-M Homes
Unit 3
103 Denison Street
Markham, Ontario
L3R 1B5

Dear Mr. Rosen:

Re: Property: 23 Sawyer Crescent, Markham, Ontario

...my lawyer advised me today that he received a letter from your lawyer stating that the closing date on the home I contracted to buy from you (23 Sawyer Crescent, Markham) on February 21, 1983, has been pushed forward again, this time to December 29, 1983.

This is unacceptable!

Let's review the facts:

1. The home was purchased on February 21, 1983, closing date of July 15, 1983. 23 Sawyer Crescent, Markham.
2. I sold my home at 97 Reginald Crescent, Markham, based on this agreement and moved out July 15, 1983.
3. In early July, you asked for and received an extension to August 30, 1983, at which time Mr. Moad advised that is the final extension or you pay my costs of moving, storage, etc.
4. We never received a reply from you.

. . . . .

7. In June/July, I was still given the impression by you and Tom Brethour that the start date was imminent and August 30th still held.

8. I rented a home short term in Caledon East until September 6, 1983, and put my furniture in storage.

9. ...My three children start school in Markham in early September. The rental situation is impossible.

. . . . .

11. My costs to-date are getting out of hand, not to mention the unbelievable inconvenience and strain put on my family as a result of your actions.

12. You still haven't even started construction.

13. I calculate that this "deal" has so far cost me the following:

a) Interest lost on down payment	400
b) Sale of home on Reginald Crescent would bring $10,000 more in today's market than in February 1983.	10,000
c) Moving expenses that wouldn't have been incurred if the home was ready July 15, 1983	1,500
d) Rent to-date	1,000
e) Government Grant now lost	3,000
f) Increased lawyer fees	1,000
[Total]	16,900

(Exhibit 20, Tab 3: Extract)

> "I have moved out of my previous home since June 18/83 and am now living in a temporary residence."

The above letters merely offer a taste of the general situation inflicted on these purchasers.

Many of the purchasers were first time homeowners and would have been entitled to federal or provincial grants or loans which they lost by reason of the delay. In short, the inconvenience, loss of time and money, stress and suffering experienced by these purchasers was extreme.

The vendor (i.e., Mr. Rosen's Appellant corporation[s]) advanced certain reasons for the delays in closings, such as an aforementioned carpenters'strike, inability on the vendor's part to close with its vendor (the vendor having executed the aforementioned Agreements of Purchase and Sale had apparently not acquired title to the lands to be built upon, and was indulging in a law suit with the person(s) or corporation(s) from whom he was purchasing which, judging from the testimony we heard, was being conducted at a very low level indeed; that, however, is irrelevant to our present purposes) and the vendor also cited lack of co-operation from the municipality, the Town of Markham, in respect to the issuance of building permits. However the Respondent called among its witnesses a Mr. Joseph Thomas Silver who is an official of the Building and Zoning branch of the municipal government of the Town of Markham. His evidence, which we deem indisputable, was that building permits had been issued for the buildings which were the subject of the purchase agreements in question which were ready to be picked up. His evidence was that, far from doing so, the vendor requested and was paid a refund of the building permit fees he had paid (or the refundable portion thereof, amounting to some $2,948.00).

For example, the building permit in respect to the home contracted to be sold to Frank and Cynthia Vittorio had already been cancelled and the fee refunded to the vendor when the vendor wrote the following letter to their solicitor:

(Exhibit 16, Tab 11: Extract)

> Re: Tri-M HOMES, MARKHAM VILLAGE
> SALE TO: Vittorio
>
> This letter is to inform you that the closing date in this transaction is being extended to June 29, 1984 for the following reason.
>
> Marmion Building Corporation is currently encountering problems between itself and the subdivider from whom it has purchased the subject

> property and consequently Marmion Building Corporation as Vendor is presently involved in litigation with the subdivider in order to resolve the matter. The subdivider is presently in receivership and is being represented by the Clarkson Company in behalf of the Bank of Commerce.
>
> Therefore for reasons beyond our control, the Marmion Building Corporation is exercising its right to extend the closing date pursuant to paragraph 3(a) of the Agreement of Purchase and Sale.
>
> Yours Truly,
>
> Moe Rosen
> President

That letter did not bespeak the truth of the situation. It left out the truth. What it should have said was "I have cancelled your building permit. I am not, therefore, intending to build your home". It might have gone on to say "My real reason for extending matters, delaying bringing things to a head by telling you the truth, is that I wish to keep your $10,000 until June 29th, 1984 or even longer if I can". It will be noted that the letter was signed by Mr. Rosen and the Tribunal is clearly satisfied that it was entirely his work and that he was aware of the enormous untruthfulness of it. The Tribunal is satisfied that this is but one example of many disclosed in the record of this hearing of Rosen's dishonesty within the meaning and contemplation of the aforesaid Section 7(1)(c)(ii) of the Act.

The letter of June 7th, 1983 over the signature of Rosen's (the Appellants') solicitor Mr. Kichler as quoted above on page 4 (Exhibit 19, Tab 5) states that "the closing of the transaction is hereby extended to August 30th, 1983....due to construction delays..." At that point in time June 7th, 1983, the vendor had neither title to the land nor, in fact, his building permit. In the Tribunal's opinion that failure to inform the purchaser of the true reason for delay was a piece of misrepresentation amounting to dishonesty. The Tribunal attributes such dishonesty to Morris Rosen and holds that it constitutes dishonesty of the sort referred to in Section 7(1)(c)(ii) of the Act. Moreover, the Tribunal holds that the record of Mr. Rosen's misconduct as disclosed in evidence at this hearing abounds in ample and sufficient examples of his dishonesty, lack of integrity and failure to carry out his or his companies' undertakings in accordance with law fully sufficient to justify the Proposals appealed from and the upholding by the Tribunal of those Proposals.

The whole gist and manner of Mr. Rosen's conduct as disclosed in evidence before us was false and untruthful. This was aggravated in our perception by a most distasteful failure by him to return telephone calls, to talk to the purchasers in their grievous distress or generally to treat them with simple and common decency. By failing to refund them their deposit money, he deprived them of the use of it and in our view dishonestly converted the same, and certainly the interest on it, to his own use. In the terms and specific language of the Statute, the Tribunal unanimously holds that the past conduct of Morris Rosen while he was an officer and director of both Marmion Building Corporation and Tri-M Construction affords reasonable grounds for belief that his undertakings or those of any corporation of which he may be an officer or director (now or in future) will not be carried on in accordance with law and with integrity and honesty.

The Tribunal notes that the Warranty Program has paid some $210,000 from the Compensation Fund established under the terms of the Act to the disappointed home purchasers in this case and that the same remains unpaid by the vendor and outstanding at this time. The purchasers having received their indemnification from the fund, have transferred and conveyed their rights of action against the vendor(s) to the Respondent.

The Tribunal also notes the provisions of Section 8(2) which reads in part as follows:

> Subject to Section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration...or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts...

The Tribunal holds that the Registrar is entitled to the remedy sought by him on this ground as well.

Approximately 10 of the purchasers or prospective new homeowners remained ready, willing and able to close their transactions right down to the time when the Warranty Program repaid them their $10,000 deposits from the Compensation Fund. Others of the purchasers, a majority of them, eventually instructed their lawyers to write requesting the return of their deposits after the aggravations imposed upon them by the vendor had become intolerable - a point reached at various different times depending on the varying tolerance levels of these various individuals. Invariably, such a request for the return of purchase money was answered by a letter from Mr. Rosen in the following vein:

> (Exhibit 21, Tab 6)
>
> Dear Sir:
>
> Re: Purchaser MITCHELL
> Lot No. 7A Plan M1900(65R-4218)
>
> We are in receipt of your letter in respect to the above Purchaser and understand that you are solicitors for the same. We are treating your rescission of the agreement of purchase and sale between the purchaser and Marmion Building Corporation as an anticipatory breach of the contract between the parties.
>
> You are hereby notified as per the Agreement of Purchase and Sale between the Purchaser and Marmion Building Corporation that Marmion Building Corporation, as Vendor is declaring this transaction at an end and is hereby retaining the deposit on the above lot as damages for breach of contract between the parties without derogation from any other rights which Marmion Building Corporation may have.
>
> Yours Truly,
>
> Moe Rosen
> President

We think this letter and the more or less identical letters which were sent to other purchasers who attempted to get their money back when it became clear to them that it was most unlikely that the vendor had any intention of constructing a new home or conveying the same to them amply illustrates the harsh and predatory quality of the individual at whose mercy these unfortunate purchasers found themselves. In the view of the Tribunal neither consumers nor the Compensation Fund administered by the Warranty Program should ever be exposed to the risk of further or future injury by this individual.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to forthwith revoke the registration of the Appellants Marmion Building Corporation and Tri-M Construction.

The Tribunal further advises that this revocation shall be permanent and as well that neither Mr. Rosen nor any company wholly or partially under the control of Mr. Rosen receive registration under this Act.

MICHAEL LLOYD McPHEE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., Chairman
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

COUNSEL: MICHAEL McPHEE, appearing in person

BRIAN W. CHU, representing the Respondent

DATE OF HEARING: 8 August 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal finds that there is a crack in the east foundation wall of the home. This crack is located under the basement stairs on the east wall at approximately fourteen feet from the rear south wall. The crack varies from hairline at the basement floor to approximately 1/16th of an inch admitting the insertion of a business card at a spot where it meets the masonry on the exterior. The crack permits water penetration causing stains on the wall and stains on the floor, and (according to the Appellant) does not permit the finishing of the basement in that area.

Since the claim was made beyond one year, in order to succeed the appellant must demonstrate that his claim is based upon the existence of a major structural defect as defined in the Regulations.

Upon the evidence before it, the Tribunal finds:

There has been no failure of any load-bearing portion of the building, nor has its load-bearing function been materially and adversely affected.

The crack does not come within the inclusion expressed within the regulation major cracks in basement walls; the crack is hairline plus, the fact that water seeps through to the degree described does not indicate a major crack.

The dampness and, since the water presence is of a degree that it can be so described, comes within the exclusion expressed within the regulation for it is not that arising from a failure of a load-bearing portion of the building. Such a failure has not been found by the Tribunal. The Appellant has made an argument and has extrapolated the definition of failure to be that of failure to prevent the seepage in of water. The Tribunal does not agree. The failure must be related to load-bearing function and the Tribunal has found no such failure.

The Tribunal finds that the seepage of water through the crack is not such as to materially and adversely affect the use of the building for the purpose for which it was intended. The area purchased was unfinished. The use has been, and will continue to be that of normal residential occupancy of a home. It may not meet with the plans of the Appellant, but a claim must come within the provisions as stated in order to be valid.

Reference was made by the Appellant to the presence of electrical home equipment and its juxtaposition with the water. The Tribunal is of the opinion that such does not render the home unhabitable, or prevent the building from being used for the purpose for which it is was intended, or materially and adversely affect such use.

The Tribunal finds that the condition of the basement wall by virtue of the crack described before the Tribunal, was not that of a major structural defect within the meaning of the term of this particular warranty.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. JOSIP MUNCIC

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW HOME WARRANTIES PLAN ACT.

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C. VICE-CHAIRMAN as CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: MARK GROSSMAN, representing the Appellant

BRIAN CHU, representing the Respondent

DATE OF HEARING: 29 April 1985 Toronto

REASONS FOR DECISION AND ORDER

The point of issue in this case is an interesting and important one. We are glad to have had the opportunity to determine and to put into the record of decided cases our decision upon the point in order that the same may serve some useful purpose for the future.

Subsections (3) and (4) of Section 13 of the Ontario New Home Warranties Plan Act read as follows:

> (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate.
>
> (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

The Agreed Statement of Fact discloses:

1. The builder, Anniversary Homes, enrolled the home on March 28, 1983 located on Lot 29 of Plan 1515 in the Municipality of Waterloo, known municipally as 7 Oswego Court, Kitchener.

2. Mr. & Mrs. Josip Muncic ("the Muncics") purchased the home and took possession of the same in June of 1983.

3. The builder, Anniversary Homes, failed to deliver to the owner a "Certificate of Completion and Possession".

4. The Ontario New Home Warranty Program first received written notice of the Muncics' claim by letter dated July 19th, 1984.

5. The alleged defects arose within one year of possession.

6. The parties agree that if written notice had been given to the Warranty Program within the first year, four of five defects would have been covered under the first year warranties.

The nub of the problem, of course, is that the builder failed to deliver the necessary Certificate of Completion and Possession. The Appellant's argument was that, in view of this, the warranty period never began and therefore never ended. But this the Tribunal rejects. The statute is specific as to when the warranty begins - its begins on the date of the delivery of possession or, if you like, on the date of completion and possession. (The word "completion" apparently referring to the completion of construction rather than completion of the conveyance.) However, the certificate, which the builder or vendor is under a mandatory obligation to deliver, is merely the best evidence of the date in question, but where lacking is not the only possible evidence of that fact which is a fact of historical record.

The warranty protection conferred by the Act is conferred by the Legislature and was not found at common law. The rights thus given are limited qualitatively, quantitatively and temporally. In the latter regard they are limited to the first year (or in certain cases to the first five years) - not the first year following the delivery of the certificate, but the first year following the event which the certificate is meant to certify or evince. Failure by the vendor to deliver the certificate does not alter this.

In the case of Re: Webb (1982) C.R.A.T. Summaries of Decisions, Vol. 11, p.125, a decision of this Tribunal released on March 29, 1982, it was held (reading from the fourth paragraph from the end of that decision):

> "The law is a matter of public notice, ignorance of the law is of no avail. Failure by the builder to file the Certificate of Completion and Possession in this case did not alter the fact that the Claimant took possession in October 1977 and that the 1 year warranty lapsed one year thereafter and that no claim pursuant to it would be valid unless communicated to the Warranty Program in writing as provided by Reg. 4(1) as aforesaid."

The same principle applies in this case.

Accordingly by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranty Plan Act the Tribunal directs the New Home Warranty Program to disallow this claim.

MR. AND MRS. LOUIS NATALE

APPEAL FROM TWO DECISIONS OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIMS

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman
HELEN J. MORNINGSTAR, Member
D.H. MACFARLANE, Member

COUNSEL: LOUIS NATALE, appearing in person

ROBERT HARRISON, representing the Respondent

DATE OF
HEARING: 10 July 1985

REASONS FOR DECISION AND ORDER

The cracks in the basement and other walls as mentioned in the first Proof of Claim entered as Exhibit Number 9 do not in the Tribunal's opinion constitute a major structural defect as defined in the Regulations, that is to say, they do not, provided proper maintenance is provided which is the homeowner's responsibility, present an imminent threat of the collapse of the building, nor do they render the home uninhabitable.

The same conclusions have been reached by the Tribunal in respect to the problems set out in the second Proof of Claim which has been entered as Exhibit Number 10.

The Tribunal has felt some reservations concerning the fireplace but upon earnest consideration of the evidence before it, the Tribunal is unable to conclude that any major structural defect as defined exists here either. Therefore, unfortunately, these appeals fail.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow claim number one and to disallow claim number two.

G.H. PERKINS CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR MEMBER
WILLIAM WATSON, MEMBER

APPEARANCES:
MURRAY R. YOUNG, counsel for the Applicant

BRIAN M. CAMPBELL, representing the Registrar under the Ontario New Home Warranties Plan Act

DATES OF HEARING: 15, 16 April 1985
8, 9 October 1985 Ottawa

REASONS FOR DECISION AND ORDER

This hearing was held on April 15th and 16th and continued on October 8th and 9th, 1985 pursuant to section 9 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 (hereinafter referred to as the Act) before the Commercial Registration Appeal Tribunal sitting at Ottawa, Ontario, Mary Jane Binks Rice, Q.C., Vice-Chairman as Chairman, Helen J. Morningstar and William Watson as Members, in the presence of Murray Young, counsel for the applicant, and Brian M. Campbell, counsel for the Respondent.

The applicant had requested a hearing, after receiving a Notice of Proposal dated July 20, 1984, (Tab 50 of the Respondent's documents filed in its entirety as Exhibit 6) under Section 9 of the Act, from the Respondent revoking its registration under the Plan for the following reasons:

> " Pursuant to the provisions of Section 9 of the Ontario New Home Warranties Plan Act, 1976, the Registrar hereby gives notice of his proposal to REVOKE your registration under the plan for the reasons shown below:
>
> 1. You have a record of breaches of warranties within the meaning of subsection 2 of section 8 of the Ontario New Home Warranties Plan Act, 1976, TO WIT:

(A) You have failed to comply with conciliation decisions rendered by the Warranty Program October 13, 1983 and February 23, 1984 in respect of premises owned by Mr. Gordon William Dowser pursuant to an agreement between this owner and G.H. Perkins Construction Ltd. dated April 7, 1983 in respect of Part Lot 37, Plan 911, Township of Osgoode, municipally known as Part Lot 37, Dow Street, Metcalfe.

(B) Specifically, you have failed to comply with some 7 items found to be warranty items by the Warranty Program in respect of the aforesaid premises and reflected in the aforesaid conciliation decisions which work was subsequently contracted out to a subcontractor by the Warranty Program, completed by the subcontractor, and paid for by the Program.

(C) You have failed to respond to letters dated August 25, 1982, October 4, 1982, December 1, 1983 and March 5, 1984 in which the Warranty Program advised that the provisions of the Conciliation decisions be complied with by you and which were not so complied with.

2. In the alternative and pursuant to the provisions of subsection 2 of section 8 of the Ontario New Home Warranties Plan Act, 1976, you have committed breaches of terms and conditions of registration: TO WIT:

(A) In failing to comply with the conciliation decisions and the requests of the Warranty Program to so comply you have contravened subsection 3 of By-Law R-2 in that as a registrant you have failed to diligently perform or caused to be performed all obligations imposed on you under the Plan and under any agreement (being the Vendor/Builder Agreement signed by you April 18, 1978 made by you with the corporation in respect of the Plan); "

The Respondent introduced evidence as to the vendor/builder agreement between the Ontario New Home Warranty Program and G.H. Perkins Construction Ltd. of April 18, 1978 and the contract executed between the applicant and Gordon William Dowser establishing the applicability of the Act and the Tribunal's jurisdiction. The Respondent also introduced letters from Mr. Dowser to the New Home Warranty Program of August 18, 1983, and September 23, 1983 as well as correspondence from the Program to the applicant of August 25, 1983 and October 4, 1983, which in essence set out the initial complaints. The evidence introduced indicates that the Program responded to the complaints by preparing a conciliation report on October 13, 1983. The applicant and the Dowsers were both in attendance for this inspection. On October 17, 1983, the conciliation report was mailed out to the Dowsers and the applicant, the latter who was given thirty days to remedy the complaints. Without getting into all the details of the specific construction problems, the complaints and respective recommendations for corrections were as follows:

(I) The Contractor to remedy the weeping bed of septic system which was leaking to the surface, by taking the action recommended by the Department of the Ministry of Environment, i.e. to execute any compliance order issued by the Ministry of Environment.

(II) The Contractor to rectify the floor joist of the rear bedroom floor to level that floor.

(III) The Contractor to install doubled joists beneath the closet walls to level the floor in the front bedroom.

(IV) The Contractor to finish the mouldings around the windows and doors.

(V) The Contractor to rectify the crack in the fireplace.

(VI) The Contractor to finish the caulking of the tiles in the bedroom.

(VII) The Contractor to remedy water leakage into the basement at well pipes.

(VIII) The Contractor to finish the area under the living room window.

(IX) The Contractor to seal the well pipe connections where they penetrate the front foundation.

(X) The Contractor to fortify supports at the basement stair location.

Upon receipt of the conciliation report, the applicant did perform some of the repairs requested, in particular, the matters set out in (II), (III), (V), (VI), (VII), and (VIII). A further inspection and conciliation report at which the applicant was not present, which indicated that the above items (II), (III), (V), (VI), (VII), and (VIII) had been performed, was prepared on February 23, 1984 and sent out on February 28, 1984. The specific matters to be repaired are as follows:

(A) The Contractor should attach wood moulding to the back of the kitchen counter area.

(B) The Contractor should duct the bathroom fan directly to the exterior, properly insulate it and repaint the stained ceiling.

(C) The Contractor should seal the foundation at the exterior where the well pipes connect - this repair had been previously recommended as Item (IX) above conciliation report October 13, 1983.

(D) The Contractor to complete supports to beams at basement stair location - this repair had been previously recommended as Item (X) in the previous conciliation report.

It was further observed that the weeping bed systems had been completed by a contractor hired by the Program and the owners had not reported any further malfunction. Mr. Perkins had not taken any steps to rectify within the specified period. The subsequent conciliation report was forwarded to the applicant to rectify those matters set out within thirty days. As in the previous report, the sanction to the registered contractor is that if the repairs are not made within that period, the Program will have the work done and invoice the contractor. A further work schedule on April 13, 1984 was prepared by the Program which, to a large extent, dealt with matters considered in the February conciliation report. The Program arranged for the work to be performed and invoiced the applicant.

As previously stated, the position of the Program is that the applicant failed to remedy several items set out in the two conciliation reports referred to, that all these items were in the nature of work the applicant had contracted to perform, that all these items were warranted and that the Program was compelled to pay other contractors to perform these repairs. As the Applicant would not repay the Program for the total amount it had expended, the applicant's registration should be revoked.

The most costly item is the septic system. The applicant failed to comply with the request of the first conciliation report and the Program had the work performed and rendered a total invoice for the tile bed work for $6,031.75 (which included an administration cost of fifteen percent) see Tabs 24, 26, 40 and 45 of Exhibit 6.

The applicant took the position that the contract dated April 7, 1983 provides in paragraph 1 that the house would be constructed according to the plans and specifications attached to the contract. Paragraph 13 of the contract provides "sewage disposal: health unit requirements: Extra fill if needed supplied by owner". As the system was designed by the Ministry of Environment and the certificate of approval was issued on April 6, 1983, it was not the responsibility of the applicant to supply another septic tank, more tile or labour for the appropriate and new design. The system was installed in accordance with the specifications in the certificate of approval and a certificate of use was issued following final inspection. The applicant has argued that the reason for the failure was the original design and not the installation by G.H. Perkins Construction Ltd.

Counsel for the Program has, with respect to the question of the repair to the septic system referred to two previous decisions of the Tribunal: (1) Decision and Order of the Commercial Registration Appeal Tribunal signed by Matthew Sheard, Q.C., Vice-Chairman, regarding a hearing held on October 26, 1979 with respect to Ernest L. Harper Limited as applicant and the Registrar under the Ontario New Home Warranties Plan Act as Respondent; (2) Decision and Order of the Commercial Registration Appeal Tribunal signed by John Yaremko, Q.C., Chairman regarding a hearing held on November 20, 1979, and February 6, 1980, with respect to M.E. Ethier Construction Limited as applicant and the Registrar under the Ontario New Home Warranties Plan Act as Respondent. Both decisions deal with fact situations remarkably similiar to those presently before the Tribunal. The Tribunal has found these decisions helpful but, of course, the decision of the Tribunal is based on the very facts before it. In the case involving Ernest L. Harper Limited the Tribunal stated as follows:

> "Responsibility for it rests with the person in charge, and, in a house construction project, that person is the builder. He is responsible both to the new homeowner and to the Warranty Program during the full period of the warranty. He may have a separate claim over against the sub-contractor, or even, in some hypothetical case, against an inspector if he can prove, say, gross negligence, wilful intent to defraud or some malicious intent to do damage or injury to him which is recognizable under law; but any such case would be a matter between the builder and the party or parties who had done injury to the builder, and the place to settle it would be in the court of proper competence and jurisdiction in the course of an action brought by the builder, but not within the context of the relationships he has with the Corporation or the new homeowner, which are clearly encompassed by the Contract of Purchase and Sale and the Vendor/Builder Agreement."

Mr. Dowser, the owner, who is and was occupying a warranted home, on which the builder's one year warranty had not expired, had declared the total failure of the septic system leaching bed. The condition was confirmed by the Program and the Department of the Environment. The owner was entitled, under the conditions of the Ontario New Home Warranties Plan Act, to have such failure of the system rectified either by the builder, who was responsible for the installation of the system, or by the Warranty Program in the event the builder could not or would not perform the repairs. The Tribunal is, therefore, of the opinion that the Applicant must pay the sum of $6,031.75.

As to the other items set out in the Work Schedule of April 13, 1984, the Tribunal is of the following opinion:

> Item 1, A through D, were not on the original conciliation report, or certificate of completion, and were probably caused by wood shrinkage and are not warrantable.
>
> Item 2, A, B - These items are part of the plumbing contract and are the responsibility of the owner.
>
> Item 3 - The evidence discloses that it was repaired by the applicant.
>
> Item 4, A - This item would have been repaired by the Window Manufacturer at no charge and, therefore, we are of the opinion that the applicant should not be responsible.
>
> Item 4, B - This item was installed by the owner and, therefore, the item is not warrantable.
>
> Item 4, C - In his evidence, the applicant indicates that he accepts responsibility and, therefore, $52 plus 15% is payable by him.

The Tribunal rejects imposing responsibility on the applicant for those items set out in the invoice marked Tab 45 of Exhibit 6. As the bathroom vent is surely part of the electrical system, it is the responsibility of the owner and not the applicant. The Tribunal is of the opinion that there should be no further financial responsibility for the tile work in addition to the sum of $6,031.75.

G.H. Perkins Construction Ltd. has an unblemished record with the Program. The principals of this Company impressed the Tribunal as very honest, hardworking and responsible people. The Tribunal has found that the applicant is responsible for the septic system. Responsibility and fault are, however, two very distinct concepts. The fault for the original design or the genesis of the problem does not, in our opinion, lie with the applicant. It is not our duty to comment on what legal recourse or third party actions lie open to the applicant. It is clear, however, that the applicant as general contractor is ultimately responsible. The Tribunal has seriously scrutinized the possibility of reducing the charge of the new septic system. The fact remains that during the period that the applicant, the subcontractor, the Ministry of the

Environment were all expending time as to whose responsibility the leakage was, it was obligatory upon the Program to have the work repaired which it did and for which it paid. If the cost appears high to the applicant, which it may well be, it bears some responsibility as the applicant surely had ample opportunity to possibly perform the repairs at a lower cost, before the Program was obliged to act.

Accordingly and by virtue of the authority vested in it under section 9(4) of the Ontario New Home Home Warranties Plan Act, the Registrar by this Order is directed to carry out the proposal to revoke the applicant's registration under the Plan unless before the 14th day of June, 1986, the applicant shall have reimbursed the Program the sum of $6,091.55.

PAUL HENRY RENNICK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: RONALD KOVACS, representing the Appellant

BRIAN W. CHU, representing the Respondent

DATES OF
HEARING: 22 and 31 May 1985 Toronto

REASONS FOR DECISION AND ORDER

The vast majority of "new homes" constructed in Ontario and warranted under the Ontario New Home Warranties Plan Act, R.S.O. 1980, are conveyed by a builder or developer through a transaction of purchase and sale by which the "new homeowners" receive both the completed house as well as the land on which it stands, all at the same time and by means of the same transaction. But it is also possible to become a "new homeowner" as contemplated by the Act by means of contracting with the builder for the construction of a home on lands already owned by the "new homeowner". Such was the situation in this case.

Mr. Paul Henry Rennick, the Appellant herein, who was a forester by profession, was the owner of a substantial piece of land in Burlington, at the foot of the escarpment there. He contracted with Mr. White, a builder, to construct a house for him upon this land of his and took occupation of the house when it was finished in 1984. When the first Spring came in April 1985 it was discovered that the septic system was not functioning correctly in that effluent was ponding atop the tile bed and bursting through the berm or bank at one end of the said bed and generally malfunctioning. Mr. Rennick sought rectification of this problem under the warranty provided by the Act for new homes.

In the Tribunal's opinion the home built by Mr. White for Mr. Rennick does fall within the scope of the protection which the statute is meant to provide and, by reason of paragraph 25 of the Construction Contract, which calls for the construction of a septic system in accordance with local Health Unit standards and requirements, we deem the septic system, including the septic tank and tile bed, to be within that scope as well.

But that does not dispose of the matter. In this case the lands on which the house and its appurtenant tile bed and septic system were built belonged at all material times, i.e. before, during and after construction, to the owner, Mr. Rennick, who was accustomed to exercising the prerogatives of ownership of such lands and in fact did so at all material times and did so fairly freely at his own discretion. The reciprocal of this was that Mr. White, the builder, was not in control of the whole of the subject lands at any time.

Situated, as stated, at the foot of an escarpment, these lands at certain seasons received, as could only be expected, water run-off. The site of the tile bed for the septic system was selected by and with the approval of the local Health Unit but, as the latter's representative and Inspector, Mr. Hart, stated in his evidence, it was by no means an ideal situation for such a bed, to start with, because it was located in a kind of hollow.

The Health Unit's Certificate of Approval (upon which the Building Permit was contingent) was conditional upon certain terms and conditions which were endorsed on the back of it. Thus it was incumbent on the builder to construct both in conformity with his contract with the owner and as well (amounting to the same thing) in conformity with the conditions of the Conditional Certificate given by the Health Unit.

The Appellant argued that one or more of the Health Unit's conditions had been breached (i.e., not complied with or improperly or incompletely met) and that, in particular, a bank (or berm) at one end of the field (adjacent to a gully) which was meant to be 15 feet thick was constructed of less than that thickness. Also it was alleged that the swales or small ditches intended to carry off surface water were not deep enough and that the surface of the field was not shaped so as to adequately shed water.

It would appear that in a case where a builder was liable in damages to a homeowner for a breach of the Construction Contract (in respect to items warranted under the Act) the protection of the Warranty Program would be available to the homeowner. But the latter would have to prove such damages. And having done so, that these were damages consequent upon the builder's breach of contract and not from some other cause for which the builder was not responsible, such as things done by persons over whom he had no control.

In this case Mr. Greenfield, a consulting engineer and impressive expert witness has given evidence which, in the context of the evidence as a whole, has persuaded the Tribunal that Mr. White, the builder, regardless of any failure by his sub-contractor to build the septic system to the very letter of the conditions or specifications referred to, was not the author of the prime causal factors leading to the damage or injury complained of which were causes outside the scope of his control and therefore of his responsibility or, thereby, that of the Warranty Program.

In its Decision in the case of Nina and Paul Campbell released in 1983 and reported at 12 CRAT (1983) 116, it was said at p.117:

> Moreover such a claim as this could only succeed if the causal fault were in no way imputable to the claimant.

In the Tribunal's opinion the prime causal factors in Mr. Rennick's problem consist of the topography of his lands, especially those which lie above and to the east of the tile bed; topography which leads to the shedding of surface water or run-off (especially in the wet seasons) upon the surface of the tile bed and which adverse topography is the result at least in part of certain landscaping operations effected by the Appellant himself and over which the builder had no control.

The Appellant's contribution to the overall damage or injury sustained by him also included failure by him to place or plant grass or grass sod over the bed to encourage what is called evapo-transpiration of the bed (i.e., a very usual method of using the roots and leaves of grass in conjunction with the passing currents of dry air to extract unwanted moisture from the soil) as well as his decision to roto-till the bed (to plant a garden of corn) which produced depressions in the surface that became puddles to aggravate the overall wetness.

The Tribunal sympathizes with the Appellant but it is not fair to penalize a builder or anyone else for a fault for which it has not been shown that he is primarily responsible, especially where the penalty which he would ultimately be expected to pay was going to be paid over to the benefit of the person who was responsible, in whole or in part, for such fault.

Accordingly the appeal fails and by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ROCCO D'AGOSTINO HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
KENNETH VAN HAMME, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: ROCCO D'AGOSTINO, its agent

CAROL STREET, representing the Respondent

DATE OF HEARING: 20 March 1985 North Bay

REASONS FOR DECISION AND ORDER

The Tribunal finds that in this case there was a major structural defect contrary to the Ontario Building Code and that it was a defect requiring to be repaired.

The Tribunal finds that the Appellant was given a reasonable opportunity to repair it and that the Appellant failed to do so and that the Respondent thus had no alternative but to undertake to have the work done by alternative means and that the Respondent (and/or the Corporation he represents) properly did so.)

The Tribunal finds that the cost of such work plus administrative expenses which were charged to the Appellant in the total sum of $4,002.00 were unavoidable and properly charged to the Appellant and that the Appellant has failed to pay them. The Tribunal finds that the allegations set out in the Notice of Proposal have been proven. The Tribunal notes that the Appellant Corporation and Mr. D'Agostino appear to have built a large number of homes and we would hope that the Warranty Program's outlay will be recovered from the Appellant and that the Appellant will be able to return to or remain in the industry.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the Registrar of the Ontario New Home Warranty Home Program revoke the registration of the Appellant unless within three weeks of the date of this Order the full sum of $4,002.00 is paid to the Warranty Program or to the Respondent by the Appellant.

ROYAL TRUST CORPORATION OF CANADA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: BARBARA J. PUCKERING, representing the Appellant

PATRICIA HENNESSY, representing the Respondent

DATE OF
HEARING: 12 July 1984 Toronto

REASONS FOR DECISION AND ORDER

The Appellant, Royal Trust Corporation of Canada, appeals from a Decision of the New Home Warranty Program (hereinafter referred to as the Program) disallowing a claim for damages.

Prior to the commencement of counsels' argument, Ms. Hennessy and Ms. Puckering filed an Agreed Statement of Facts as between Royal Trust and the Warranty Program. A review of this Statement indicated the following facts to the Tribunal:

1. On or about May 29, 1981 Antonio Fernando Coutinho and Sara Selva Coutinho purchased a home at 27 Harlton Crescent, in the City of Toronto, in the Province of Ontario from European Homes Limited.

2. The purchase was partly financed by a mortgage in the sum of $79,403.00 in favour of Royal Trust Corporation from the Coutinhos which was registered against the property on the day of closing.

3. On or about June 23, 1981 the Coutinhos gave notice to the Program of serious problems with the construction of the home including foundation problems.

4. On or about May 15, 1982 the Coutinhos defaulted on the mortgage from Royal Trust and vacated the home.

5. On or about July 23, 1982 Royal Trust issued a power of sale.

6. On or about July 28, 1982 an action was commenced in the Supreme Court of Ontario between the homeowners and the Warranty Program, European Homes (the builder), Royal Trust Corporation (the mortgagee), the Borough of York, Ministry of Consumer and Commercial Relations (since discontinued) and Halberstadt, Weisman (solicitors). The Plaintiff's claim was for damages inter alia for a faultily constructed home. Discoveries had been set down for the last week in August, 1984.

7. On or about September 5, 1982, the Power of Sale expired and Royal Trust went into possession of the property.

8. On or about the 13th day of June, 1983, the property was transferred by Power of Sale from Royal Trust to Frank Zerucelli for a purchase price of $43,500.00.

9. On or about March 4, 1983 Royal Trust filed a Proof of Claim with the Warranty Program claiming compensation for defective workmanship and a major structural defect. In support of the Proof of Claim, Royal Trust provided the Warranty Program with a statement of account.

10. The Program conceded that a major structural defect existed at the subject property but denied the entitlement of Royal Trust to any benefit or payment.

The question posed to the Tribunal is whether or not Royal Trust, given the foregoing facts, is an owner as defined by the Act and consequently whether or not Royal Trust is entitled to receive any benefits or payments from the Guarantee Fund. The present hearing and consequent decision is not concerned with the quantum of damages.

What is the nature of a mortgage? Is a mortgagee in possession for purposes of Power of Sale proceedings a successor in title to an owner and therefore an owner as defined in section 1(g) of the Ontario New Home Warranties Plan Act? At common law, the granting of a mortgage by a mortgagor to a mortgagee, resulted in a conveyance of the legal title in the land from the mortgagor to the mortgagee, and a mortgagor who defaulted on the last payment due under the mortgage would lose the right to have legal title to the property reconveyed to him and would also lose all money paid under the mortgage. As a result of this unfairness, the courts of equity developed a doctrine which provided that a mortgagor in default had an equitable right to redeem the property, which became known as the equity of redemption. Title therefore can refer to legal or equitable title.

Counsel for the Program strongly urged the Tribunal to consider the person who is entitled to the equity of redemption to be the actual owner of the land, arguing that the equity of redemption has always been considered as an estate in the land, and the interest in the land must be somewhere and cannot be abeyance but it is not in the mortgagee and therefore must remain in the mortgagor. Counsel further submitted that a mortgagee carrying out Power of Sale proceedings does not acquire the equity of redemption. By the Power of Sale, which was a contractual power and is now a statutory, the mortgagee may sell and convey the equity of redemption. The mortgagee's interest, however, counsel for the Program argued, should not be characterized as an interest in land. Ms. Hennessy on behalf of the Program took the position that a mortgage is properly characterized as mere security for the loan between the mortgagor and the mortgagee.

On behalf of Royal Trust, it was submitted that the definition of "owner" in the Act anticipates that at the same time there can be more than one owner. The Coutinhos were owners as they had first acquired the home for occupancy and all their successors in title are considered owners. In order to be entitled to compensation under the Act, the owner must suffer damage. Unless a mortgage is in default and the mortgagee has gone into possession, the mortgagee would not have borne any loss as a result of a major structural defect. It must also be remembered that once a mortgagee is in possession, then he has a duty to account to the mortgagor and account for the proper management of the property.

It was strongly urged on behalf of counsel for Royal Trust that title does not merely refer to legal title alone but "owner" as defined includes those who first acquire the home and their successors in title. Further it was pointed out that to determine successors in title one simply goes to the Record or abstract of Title. Exhibit 6 filed clearly indicates the initial grant of European Homes Limited to the Coutinhos as Instrument No. 680562. Then as Instrument No. 680563 the grant from the Coutinhos to Royal Trust is shown. If the Coutinhos had not gone into default and sold the property to Mr. Zerucelli, the grant would have been from the Coutinhos to Mr. Zerucelli and Royal Trust would not have been a successor in title. However, the abstract clearly shows the grant is from Royal Trust to Mr. Zerucelli and the chain of title clearly demonstrates Royal Trust to be a successor in title. Counsel argued that to arbitrarily divide title into equitable and legal, and mutually exclude one from the other, leads to absurdity in interpretation for if an "owner" means only legal title, then subsequent owners who mortgage their property would not be included and if title means equitable title alone, it would mean that owners who place second and subsequent mortgages upon their property thereby transferring their equitable title, have no status to make a claim. Counsel strongly urged that the fact that there may be more than one owner at the same time as well as several owners over a period of time as defined by the Act, simply means that the Program has to decide if as the "owner", the claimant has suffered any damages as a result of a major structural defect. In looking at the Act, section 1(g) defines owner in the following manner: "'owner' means a person who first acquires a home from its vendor for occupancy, and his successors in title."

The Tribunal is of the opinion that each claim should be considered on its merits and if a major structural defect is proved and damage has resulted, then it is the intent of the legislation to protect all persons who first acquire the home for occupancy and all successors in title. Surely a mortgagee in possession who has suffered damage as a result of a major structural defect and is a successor in title is an owner as defined by the Legislation. We feel that no unfairness results from this consequence. Royal Trust has suffered a direct loss as a result of the major structural defect in the building which decreased its resale value. The corporation is not using the New Home Warranties Plan as additional "insurance coverage" because of the obligation of the mortgagee in possession to account to the Coutinhos.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim and permit the damages claimed by Royal Trust Corporation of Canada to be ascertained. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal was subsequently abandoned.

PATRICK W. SALDANHA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HARRY L. SINGER, MEMBER
STEPHEN PUSTIL, MEMBER

COUNSEL: PATRICK W. SALDANHA, appearing on his own behalf

CAROL STREET, representing the Respondent

DATES OF HEARING: 28 June and 11 December 1984
17 September 1985 Toronto

REASONS FOR DECISON AND ORDER

Upon a review of the evidence, this appeal, at least substantially, must fail because for the most part the elements of the Appellant's claim were not matters which were warranted under the Ontario New Home Warranties Plan Act.

To the extent that the Tribunal does have the ability to find that the warranty operates, it accepts the proposal made by counsel on behalf of the Warranty Program and awards the amount suggested by her, that is to say, $80.00 plus one-half of $357.00 for the water staining and lack of insulation, plus the sum of $240.00 for the redecorating which was necessitated by water staining.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim in part, to wit, in the amount of $498.00.

HYMAN SHAPIRO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
STEPHEN JARVIS, MEMBER
D.H. MacFARLANE, MEMBER

COUNSEL: HYMAN SHAPIRO, appearing in person

CAROL STREET, representing the Respondent

DATE OF
HEARING: 25 September 1985 Toronto

REASONS FOR DECISION AND ORDER

The problem set before us was that water was coming in beneath the French doors located on the second floor of the Appellant's home and penetrating through the floor and down from the ceiling into the living room/dining room. This problem occurred at very infrequent intervals.

It was incumbent upon the Appellant, in order to succeed in his appeal from the Warranty Program's decision, to demonstrate either a failure in the load-bearing portion of the home, a failure in the load-bearing function of such, or the existence of some material and adverse effect upon the use of the building which, of course, was residential occupancy. The last mentioned definition of major structural defect requires, as we have held in the past, that the whole building, not just part of it, be affected; that the habitability of the whole house should be compromised. We do not find that in this case the habitability of the house has been so compromised. Nor do we find that a safety hazard in respect of the wiring has been established. It appears that an occupancy permit was issued at the time that the house was completed and it appears that a proper inspection of the electrical circuits in the house must have been made in order for such occupancy permit to have been granted and therefore that the electrical wiring in the house at that time was properly grounded to ensure the safety of it. We have had no evidence set before us that that grounding has been altered.

We do not find that the house is in imminent danger of collapse which would be the case if the load-bearing portions of it were in a state of failure, nor do we find that any part of the load-bearing portions of the house are in a state of failure such as to threaten imminent collapse.

On the whole, having heard and assessed the evidence which has been set before us, we are unable to find sufficient grounds to permit us to reverse the Warranty Program's decision.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

ANDREW J. SIMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM.

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
WILLIAM WATSON, MEMBER

COUNSEL: BRIAN W. CHU, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 18 April 1985 Ottawa

DECISION AND ORDER

The Tribunal determines as follows:

1. The Appellant was given notice of the Appointment for Hearing the 25th day of March, 1985 as evidenced by Exhibit 2 which contains the further Notice:

> "....if you do not attend at the hearing the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

2. The Appellant has not appeared.

3. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

YORK CONDOMINIUM CORPORATION #462

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
DR. STUART E. ROSENBERG, MEMBER
LOUIS A. RICE, MEMBER

COUNSEL: GORDON WOOLNOUGH, its agent

BRIAN M. CAMPBELL, representing the Respondent

DATE OF
HEARING: 29 July 1985 Toronto

REASONS FOR DECISION AND ORDER

This was a claim under the Ontario New Home Warranties Plan Act, R.S.O. 1980 Chapter 350 and its Regulations, brought by the Condominium Corporation in respect to alleged major structural defects in certain of the common elements in a multiple occupancy rental structure registered under the Condominium Act and it was a twofold claim being, firstly, cracking brick veneer on the west wall of the building and secondly, in respect of certain interior walls referred to in evidence which the Tribunal concludes are concrete block partitions dividing units from the common elements, viz., the common garage from the individual unit garages.

It was incumbent upon the Appellant to demonstrate a major structural defect as defined because the claim had been brought after the one year warranty described in Section 13(1) of the Act, which is a fairly broad warranty and a generous one, had lapsed through the passage of time.

A "major structural defect" for the purposes of the Act and all purposes relevant to this hearing is defined at Ontario Regulation 726, Part I, section 1(o)(i) and (ii).

In our opinion the cracking of the brick veneer referred to, no matter how unsightly from the aesthetic point of view and regardless of how the defect might have been considered by this Tribunal had the claim been a first year claim, does not meet the requirements of "major structural defect" set forth above in the definition quoted. We hold that veneer is not a "load-bearing member" and has no "load-bearing function" which therefore has not failed and could not fail. Nor has the cracking complained of adversely affected the use of the building, which use, as the Tribunal has invariably held in the past, in cases of residential structures is residential occupancy in the normal course. This claim therefore fails.

Upon its review of the evidence and of what was said in argument, the Tribunal holds that the interior walls whose condition was the subject of the second branch of the Appellant's claim were partition walls and similarly not load-bearing. Their condition in the Tribunal's opinion is the result of certain sagging in the poured concrete floors which said sagging, on the evidence, we deem to have now stabilized. Neither the cracks complained of in such wall or walls nor the distortion of certain door or door frames or any other problems having the same source such as were included in the claim and referred to in evidence were sufficient to render the building materially and adversely affected in its use which, as stated, is residential occupancy in the normal course.

We have concluded in passing, that the sagging floor, a defect but not a major structural defect as we find it, was due to a design fault on the part of the structural engineer rather than any defect in either materials or construction of the building so that, although we need not determine the point, it is no doubt moot whether the complaint would fall under section 13(1)(a)(i) in any event.

This appeal was adroitly presented and the expert evidence now set before us was impressive. Notwithstanding that we regret that it must be dismissed for the reasons stated.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

YORK CONDOMINIUM CORPORATION #528

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, Q.C., VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: JOHN HAHN, representing Appellant

BRIAN M. CAMPBELL AND BRIAN W. CHU,
representing the Respondent

DATES OF
HEARING: 10, 11, 12, 13, 14, 19, 20 June 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has reviewed with care the evidence and arguments set before it during the course of the lengthy seven day hearing. It has studied, as well, the law. It has expended much time and many pains in its deliberations over the Appellant's claims and it regrets that, in the end, it has been unable to achieve a unanimous decision. What follows, therefore, are two sets of Reasons for Decision, the Majority Decision which is to be implemented forthwith upon the release of these Reasons, and a Dissenting Decision which is to be implemented only insofar as any elements of it may correspond with the Decision of the majority.

MAJORITY DECISION

The following is the decision of panelists Matthew Sheard, Q.C., Vice-Chairman and D.H. MacFarlane, Member:

The Appellant was a Condominium Corporation styled York Condominium Corporation No. 528 and the building with which it is and has at all material times been connected is a multiple dwelling structure containing some 40 units and known municipally as No. 30 Glen Elm Avenue in the City of Toronto.

This building was designed and erected by and on behalf of a developer, High City Holdings Limited, on lands owned by it which subsequently devolved in accordance with the provisions of the Condominium Act upon the Appellant and the various unit holders. The developer, who for the purposes of the Ontario New Home Warranties Plan Act may also and preferably be referred to as the vendor, is no longer present or available to answer for its misdeeds, failures and inadequacies herein or those of its employees or subcontractors for which it would otherwise be answerable. The Appellant claims that the Respondent, under and by virtue of the warranty provided by the Ontario New Home Warranties Plan Act, is therefore answerable and responsible for these in the place and stead of High City Holdings Limited.

This is true, but only in so far as that statute creates liability on the part of the Respondent or in so far as any other law or principle of law may operate to do so. And the function of the Tribunal is to apply the law to the facts of the case as proven, primarily the Ontario New Home Warranties Plan Act but as well any other statute or legal principle of determining relevance. It is neither the function of the Tribunal nor within the scope of its jurisdiction to make any order which exceeds or varies the provisions of the relevant law as it bears upon the facts as proven in evidence and, to the contrary, any order or determination relating to this or any other issue made by this Tribunal which was not in accordance with the provisions of the relevant governing law would be in error.

It is because of these constraints upon our decision-making capability that what may be considered the bulk of the Appellant's claim before us at this hearing must fail. This is not to say that a court of law or some other tribunal sitting somewhere else and having broader powers than this one might not reach a decision in favour of the Appellant and other possible or prospective claimants in this case, either in damages or some other relief, as against the vendor and/or its sub-contractors, the architects and/or structural engineers involved, the municipal building inspectors in respect of their performance or lack of performance, and/or even against the Respondent itself, its employees or agents on the basis of some cause or causes of action beyond the mere scope and provisions of the Ontario New Home Warranties Plan Act which, in this case, is basically all this Tribunal is empowered to take into consideration.

We feel free and confident to state at the outset that this building was extremely shoddily constructed in many ways and we can make that a finding of fact for whatever it is worth. For example, the manner in which the vapour barriers were installed (or not installed) in the walls of the building was, in a word, disgraceful. The fact that this appalling shoddiness was approved in the periodical inspection reports both by the architects and the municipal inspectors is very hard to view with other than the gravest misgivings as to either the competence or integrity of such functionaries in the discharge of their duties - duties owed to parties whom we deem to have been injured or who will in the future be injured, namely, present and ultimate owners and occupants of the units and common elements of 30 Glen Elm Avenue. As well, the fact that water has entered and may in the future enter many of the units causing expense, inconvenience, and loss of property value to the owners and the occupants and their successors (as well as the condominium corporation itself in respect to any common element affected) is deplorable as are the stains and marks of efflorescence and other deficiences referred to in evidence, particularly in the highly impressive expert presentation of Mr. Tony Alexander, P. Eng. who was called on behalf of the Appellant and which must surely rank as one of the most informative and persuasive of its type preserved in the Tribunal's annals.

And yet, as indicated, and with regret, it is our opinion that the bulk of the Appellant's case must fail.

This claim, or group of claims, like any other claim upon the warranty provided by this legislation and the Guarantee Fund which underlies it, in order to succeed must satisfy the conditions precedent set out in the Act. Quite simply, except for "major structural defects", as defined, which the present deficiencies are not alleged to be, a valid claim, before it can even begin to be considered upon its merits, must be communicated to the Warranty Program in writing within the one year period during which, (and not beyond which) the warranty exists. And it must be communicated with sufficient clarity and particularity that the Warranty Program may have a fair ability to know roughly what its nature is and roughly where it is located.

If this simple, logical and eminently fair requirement of the statute which provides the warranty is not met within the time delimited, then the warranty, like Cinderella's coach and horses, disappears upon the stroke of midnight leaving the unfortunate homeowner bereft of its wondrous dispensation, and alone in the harsh, hard world (the real world) with only those remedies remaining to him or her which would have existed if the warranty had never come into being in the first place.

The evidence discloses that there are 40-odd units in the condominium building and 40-odd unit holders as well as the condominium corporation itself which owns the common elements. Of these, a certain small number of unit holders, notably, Janet Stubbs of unit number 213, Mr. Nathanielsz of unit 202 and (apparently) Mr. Lambie of unit number 303, got in on time. By which we mean they communicated a claim in writing to the Warranty Program stating, in each case, roughly what the problem was and where it was to be found and they did this before the warranty expired. Also, the condominium corporation got its claim in on time in respect, specifically, of the efflorescence on certain exterior cracks of the masonry. The Warranty Program fixed these problems and, in the case of the three unit holders, they stayed fixed. In the case of the problems of the Appellant, i.e. the Condominium Corporation, those problems just referred to have not. In our view, therefore, they must be fixed again.

But as to all the other unit holders, a still undetermined number of persons who did not file their claims as aforesaid, i.e., in the way specifically provided for in the Act, for them the lights went out - the lights went out and the warranty expired - at the stroke of midnight one year after it came into effect. Like Cinderella they were left with nothing. It was in disregard of that basic fact that the case on their behalf, in all its panoply of detail, was set before us throughout seven days of testimony and argument. (And be it noted, as well, that none of the other unit holders were named as parties to these proceedings.)

We must now consider the nature, meaning and value of the case submitted or said to have been submitted on behalf of these remaining unit holders, allegedly rising from or consequent upon certain vapour barriers, water penetration or balcony-related problems, having to do with cavity or non-cavity walls, alleged poor workmanship, and so forth. It appears that often, and in each case, (except for the three unit holders who got claims in on time and had their problems fixed, as stated) after the warranty had expired, the subject of complaints was also the subject of certain correspondence emanating from the Warranty Program during the period June 30 to December, 1982 over the signatures of Mr. Dade of the Warranty Program's Operation Department or Mr. Robert Maling, Manager of the Warranty Program's Condominium Section. Extracts from these (exhibits 24, 25, 26 and 40) read as follows:

> June 30, 1982 (Exhibit 24)
>
> High City Holdings Ltd.
> 5300 Yonge Street
> Willowdale, Ontario
>
> Attention: Mr. Wurman
>
> Re York Condominium Corporation No. 528
> 30 Glen Elm Road, Toronto, Ontario.
>
> Dear Mr. Wurman:
>
> Once again the people of this condominium are experiencing water problems in their suites from areas that would appear to be associated with the balconies above. These complaints date back to February of 1981 and fall within the builder's first year warranty period, so it is incumbent upon your firm to perform such work as is necessary to avoid further water problems.
>
> . . .
>
> Take notice then that should you not initiate work on these matters within fourteen (14) days and proceed in an expeditious manner, the New Home Warranty Program will assume the responsibility of your warranty. In the event of our having to perform this work on your behalf, the cost of such work, including any administrative costs (and interest where applicable) will be invoiced to you.

Failure to honour such invoices would result in our taking whatever legal action that is available to us.

. . .

Yours truly,

"Ray Dade"
Mr. Ray Dade,
Conciliator.

September 24, 1982 (Exhibit 25)

High City Holdings Ltd.
5300 Yonge Street
Willowdale, Ontario

Attention: Mr. Wurman

Re York Condominium Corporation No. 528
30 Glen Elm Road, Toronto

Dear Sir:

On September 16, 1982 an investigation was made by Construction Control Ltd., in regards to the water problems being experienced by the residents of the above condominium.

I was present during part of the time and observed the testing being done therefore, I concur with the finding of Construction Control.

One of the basic problems is the construction of the brickwork, the assembly of which is completely contrary to the Ontario Building Code regarding cavity wall construction, a cavity wall being any wall that has a space between the inner and outer wythe as is the case at 30 Glen Elm where the space between appears to be approximately 1 inch in the area observed. The Ontario Building Code, under section

4.4.5.14. (1)-(3) states that "where the space is not filled, such walls shall conform to the requirements for cavity walls".

In this case the masonry is:

(1) not parged on the back of the face wythe.

(2) not vented to allow for dispersal of moisture entrapped between wythes.

(3) there is no through wall flashings as required by the code.

There is also an absence of vapor barriers in some locations which again is contrary to the code.

The visual result of the existing conditions is the extreme efflorescence on the masonry and the ingress of water into areas of the building.

Further testing on a balcony slab indicates that water is penetrating at the recess in the slab which accommodates the insulation.

As these conditions were existing within the first year of the condominium's registration, and as they were noted to your firm and also to the New Home Warranty Program, it is, under the terms of your registration, the responsibility of your firm to properly make the necessary corrections to the matters at fault. Should you not do so then the New Home Warranty Program will assume your responsibility and proceed to rectify the situation where required. Should we be obliged to do this, your firm will be invoiced for all warranted work done by us, plus administrative costs (and interest where applicable), the recovery of which will be pursued by all legal means.

I would strongly suggest that a meeting be held with all interested parties within the next few days and that you call the writer upon receipt of this letter so that arrangements may be made. Should we not hear from you by the 30th of September 1982 the New Home Warranty Program will have no choice but to act in this matter.

Yours truly,

"Ray Dade"
Mr. Ray Dade
Technical Representative.

October 14, 1982 (Exhibit 26)

High City Holdings Ltd.
5300 Yonge Street
Willowdale, Ontario
M2N 5R2

Attention: Mr. Serota

Re York Condominium Corporation No. 528
30 Glen Elm Road

Dear Sir:

At this time I find that I am unable to communicate with Mr. Wygodny, for whatever reasons, therefore I address this letter to you.

On September 24, 1982 I sent a letter to your office addressed to Mr. Wurman who I understand is no longer with High City Holdings. In the letter, a copy of which is enclosed, I noted four problems with the walls of the building, all four of which contravene the Ontario Building Code. It is our mandate, that when a condominium addresses complaints to us, we order the builder to make corrections, or if he fails to do so the New Home Warranty Program assumes the warranty obligations.

In light of the fact that I cannot seem to get in touch with Mr. Wygodny and that no one at High City Holdings seems desirous of coming to grips with the problem I must give you an ultimatum.

Therefore, should there be no positive action from High City Holdings within 7 calendar days from receipt of this letter the New Home Warranty Program will proceed to do the work and invoice your firm accordingly.

Yours truly,

"Ray Dade"
Mr. Ray Dade
Technical Representative.

VIA COURIER

December 19, 1984 (Exhibit 40)

York Condominium Corp. No. 528
c/o Hahn & Maian
Barristers and Solicitors
664 Mount Pleasant Road
Toronto, Ontario
M4S 2N3

Attention: Mr. John Hahn

Dear Sir:

Re: Claim dated April 4, 1984
Our reference #10-8934-61393

This letter is the Warranty Program's decision in keeping with Section 16 of the Ontario New Home Warranties Plan Act.

By a letter delivered to the writer on April 4, 1984, York Condominium Corporation #528 claimed for payment on the following matters:

a) Stains (efflorescence) on the outside of the brick walls.

b) Balcony slab leaks.

c) Vertical cracks in the brickwork at certain exterior locations.

In further review of the claims, it has become evident that there are five items to be considered and, for simplicities (sic) sake the Warranty Program has indentified them as follows:

1) Efflorescence

2) Balcony slabs

3) Exterior wall construction

4) Vapour barriers

5) Vertical cracks in brickwork

Regarding each of these matters, I offer for your consideration the following comments and observations:

1) The problem of staining and efflorescence was reported to the Warranty Program prior to the first year anniversary of the registration of the condominium declaration and, was addressed by us as a vendor's warranty matter. The masonry contractor had not in our opinion, properly cleaned the brickwork after construction as good building practice would required (sic). In addition, some efflorescence had occurred. The Warranty Program arranged and paid for the proper cleaning of the brickwork during October 1983 at a cost of $27,100.00.

Efflorescence is a condition whereby fine (white) crystals formed on the surface of the brick and mortar joints. It is usually caused by excessive wetting of the brickwork. The wetting disolves (sic) salts contained in the masonry components and the process of evaporation deposits the salts as crystals on the exterior face of the masonry wall. Experts seem to agree that efflorescence is a time limited occurrence since, once all of the salts in the assembly have been disolved (sic) and brought out of the wall the phenomenon stops. Of course anything that can be done to prevent excessive wetting will reduce the amount of the surface deposits.

In the opinion of our consultant, water in (sic) entering the masonry assembly at 30 Glen Elm Avenue from exterior sources such as the balcony slabs, which have designed drainage patterns whereby each balcony drains onto the one located below it. This drainage pattern saturates the walls in the balcony areas and is the most probably (sic) cause of the minor amount of efflorescence that has re-occurred since our cleaning of the walls in 1983.

The problem then is one of design rather than workmanship or materials. If the balcony drainage was to be changed by for instance installing drain spouts to shed the water away from the building, the problem might be resolved.

Additional moisture may be entering the walls through shrinkage and temperature related mortar joint cracks and areas of deteriorated caulking. These problems should be addressed by the condominium as part of their normal maintenance program.

2) Regarding balcony related leaks, this matter as well was reported in the few units during the first year of registration. It is the Warranty Program's understanding of the problem that it is caused by the fact that the design calls for the masonry walls to rest on the structural, concrete floor slabs with no previsions (sic) in the design to prevent water entering the wall assembly from the higher surface of the balcony topping and, thus into the adjoining suite. (This condition is also contributing to the problem of efflorescence explained in Item 1).

Of the 40 units making up York Condo Corp 528, we are aware of 4 units which have such water entry problems.

3) We have reviewed the built construction (sic), design drawing and specifications in respect to the masonry walls of the building and are satisfied that they are constructed in keeping with the contract drawings and, are structurally sound. This particular claim was not presented to the Program until after the expiry of the Vendor's warranty and, can only be considered under the provisions of the major structural defect warranty.

4) Similar to Item No. 3) the matter of vapour barrier installations was not reported to the Warranty Program until after the Vendor's warranty had expired. Our investigation into this matter confirmed that in a very few small areas and, not on a consistant (sic) basis, some vapour barrier has been omitted. However, there is no damage evident of a structural nature or otherwise, that might be attributed to this condition. Having specifically checked areas where efflorescence has occurred, we found the vapour barrier to be properly in place. In our

opinion, the fact that some minor areas of the assembly may not be vapour barriered, does not contribute to the problems being experienced in this building to any degree.

5) Regarding verticle (sic) cracks evident in the building, one such crack at the east end of the building was apparently previously repaired (by the builder). It was in the opinion of our consultant caused by the normal occurring forces of shrinkage associated with the curing of the structural concrete walls behind the brick veneer. However, at one location at the top (balcony) corner of the west end of the building, there is a significant masonry crack apparently due to a lintel related problem. The Warranty Program estimates that particular problem could be rectified at a cost of no more than $1,000.00.

Take notice, it is the Warranty Program's decision that none of these matters are covered by the provisions of Section 14 of the Ontario New Home Warranties Plan Act.

Our reasons for this deicision (sic) are as follows:

a) The Condominium Corporation has not proven that any defects in materials or workmanship exist that result in failure of the load bearing portion of the building, or materially and adversely affect its load bearing function.

b) No defects in materials or workmanship have been shown to exist that materially and adversely affect the use of the building for the purpose of being a residential condominium.

c) There is no significant damage due to soil movement, no major cracks in basement walls, no collapse or serious distortion of joints or roof structure, and no chemical failure of materials.

d) Any dampness that has occurred does not arise from failure of a load-bearing portion of the building.

e) Any damage that has occurred is damage to finishes.

Furthermore, with the exception of Item 1) and Item 2) none of the matters were reported to the Warranty Program within one year after the registration of the declaration.

Regarding Item 1), staining to the exterior brickwork, the Warranty Program contracted and paid for cleaning off of mortar droppings, efflorescence, etc. associated with the original construction. Any further efflorescence that may have occurred is not a result of substandard workmanship or defective material, does not render the building unfit for habitation and does not result from construction not in accordance with the Ontario Building Code. It does to the best of our knowledge result from the failure of the design to prevent water from being directed onto and into the masonry. Any cracks that may exist in the mortar joints or caulked joints are a result of shrinkage caused by drying after construction and/or normal wear and tear. Any contribution to the efflorescence due to normal wear and tear is a result of failure in the part of York Condo Corp No 528 to properly maintain these areas.

The leaks associated with the balcony slabs are not a result of poor workmanship, defective materials or construction not in accordance with the requirements of the Ontario Building Code. They do not render the building unfit for habitation. The leaks are to the best of our knowledge due again to the failure of the design to anticiapte (sic) water entry or the effect of the balcony drainage pattern.

> Section 16(2) of the Act requires that I inform you that you are entitled to a hearing by the Commercial Registration Appeal Tribunal if within 15 days you mail or deliver notice in writing requiring a hearing to both, the Warranty Program and the Tribunal.
>
> In respect to the crack repair at the top (balcony) corner at the west end of the building, the Warranty Program is prepared to pay to Y.C.C #528 the sum of $1,000.00 in full and final settlement of that item.
>
> Yours truly,
>
> "R. Maling"
> Robert Maling
> Manager
> Condominium Section

It will be noted that some of those letters were written to the vendor and developer, High City Holdings Ltd. As has already been indicated it is our opinion that High City Holdings Ltd. was a rather villainous entity. Our opinion, further, is that Mr. Dade and Mr. Maling, by means of their letters, were endeavouring to persuade or otherwise induce High City Holdings Ltd. to somehow do its honourable duty by these unit holders and the Condominium Corporation upon whom it had fobbed or otherwise conveyed the results of its shoddy incursion into the construction field. The purpose of their letters to the abominable developer was without question an honourable purpose - simply, and on behalf of the present Appellant and the unit holders who are not parties to these proceedings, to induce it to remedy the perceived defects in its construction of this building. None of the interested parties to this appeal would have other than applauded their efforts, especially had they produced the results which they intended, that is, to have brought about the restoration or cure of the problems to which they referred. However, they didn't, because the developer either wouldn't or couldn't undo its structural misdeeds before being overtaken by nemesis. It is not clear to us whether this took the form of bankruptcy, the absconsion of its officers and principals, or just what, but, as appears, the High City entity has now, metaphorically speaking, disappeared from the screen.

This left Mr. Dade and Mr. Maling, like so many letter-writers before them, as well as their employer, the Warranty Program, in an ostensibly compromised and certainly embarrassing position. This was vis-a-vis the Appellant and the unhappy unit holders. Now the latter have taken the position that the Warranty Program is *bound* by their assertions or undertakings (set forth in the letters) as to the liability of the Warranty Program or by their assertions (in the letters) that the warranty, in the cases of these claimants, was viable.

We repeat, the indiscretions (as the Warranty Program has no doubt come to see them) contained in the Dade/Maling letters were *intended* to effect a good purpose. Equity, were it to come to some involvement in this issue (which it doesn't) would smile or at least look without disfavour upon that innocent fact at the outset. The claimants, both known and suspected in this case, now pin their hopes to the notion that the Warranty Program, having putatively accepted liability for these problems in that correspondence, and having done so in writing, is in fact liable. That notion, so logical and straight forward in the mind of any simple right-thinking non-specialist observer, especially one who perceived a substantial financial benefit from it, becomes significantly less so when passed through the mind of a lawyer. For those who have received the alleged advantage of a legal education will know that a warranty which was bestowed in the first instance by an Act of provincial parliament and which, upon the terms upon which it was created, has already expired, terminated, lapsed and died, cannot be brought back to life by a mere letter, no matter how well-intentioned or indiscreet. Parliament decreed that the warranty would die at midnight at the end of its first year of existence. Once dead, only Parliament can bring that warranty back to life. Nothing, no matter how well-intentioned and foolish, written or stated by an employee, agent or official of the Warranty Program can alter or impede the inevitable operation of an Act of the Provincial Legislature.

But equity presents a possible exception to that general rule. This is the doctrine of estoppel. Had the Warranty Program, by the letters to which exception has been taken, somehow *induced* the applicant of any other claimants to sustain a *detriment* in *reliance* upon the assertion set out in the letters referred to, then, on the authority of the rule in *Re: Wentworth Condominium Corporation No. 45*, a Ruling released by the Tribunal April 17th, 1985, the Respondent would have been estopped from relying on Section 15 of the Act and from maintaining that the warranty had expired when the claim was made.

But that is not the case in this instance. Neither the Appellant nor any of the unit holders (who are not parties to this appeal) suffered any detriment springing from any reliance they may have placed upon the Respondent's letters. This was because their rights under the Warranty were already dead when the first of such letters went out. He who lies on the ground cannot fall. He who is already dead cannot be slain. He whose rights are already dead cannot sustain a detriment - other than disappointment - from the communication to him of erroneous information, no matter how well or ill-intentioned. Consequently, the Dade/Maling letters upon which the Appellant has placed some reliance and which are no doubt of considerable embarrassment to the Respondent are of no effect at law. And that is why this appeal in respect to the bulk of the claims to which it relates must fail.

We feel that it must go without saying that we have a very great deal of sympathy with the Appellant and the unit holders who are involved in this unfortunate matter. We wish them well in whatever further proceedings they may decide to undertake elsewhere. We are very pleased to be able to allow them the relief referred to in respect of the cleaning or repairing of the efflorescence, referred to above, as well as to the crack to which mention has been made.

We agree that they are the victims of a "raw deal" from the vendor. However, we are unable to find that the Ontario New Home Warranties Plan Act, save as to the extent mentioned, is available as a tool to help them.

DISSENTING DECISION

The following is the Decision of Helen J. Morningstar, Member.

I concur with the Decision of Matthew Sheard, Vice-Chairman, and D.H. MacFarlane, Member, with one exception, which appears below with reasons:

The Ontario New Home Warranties Plan Act (ONHWP Act) is consumer legislation designed to protect the public from unscrupulous and shoddy builders. If a builder reneges on his contract, the Ontario New Home Warranty Program (ONHWP) takes over and repairs any problem areas. This is the reason for my dissenting decision on this one point.

In its decision letter, [Exhibit 40(2)] signed by Robert Maling, Manager, Condominium Section, ONHWP, the Program stated that "regarding balcony related leaks, this matter was reported in the few units during the first year of registration". This is a requirement of the Act, Section 13(4).

Janet Stubbs, a graduate lawyer, practiced with McCarthy & McCarthy and is now an opera singer, testified that she purchased a condominium #213 in June 1982, almost two years after it was registered, and complained to the ONHWP about water penetration into her suite. It was repaired to her satisfaction, and she has had no further problems. Nowhere in evidence did she send a claim form, or a claim in writing to the ONHWP as required in the Act, Regulation 726, Part II, Section 4(1)(2)(3).

Mr. Lambie complained in writing to the builder with a copy to the ONHWP regarding problems in his unit #303, Exhibit 35, but an unsigned note on Lambie's letter stated that Wurman (for the builder) says he has inspected and cannot find any leak - unsigned writer to write Lambie.

Mr. Nathanielsz, President of York Condominium Corporation #528 said in evidence that his condominium unit had been repaired, but there was no evidence that he had sent either a claim form or a claim letter to the ONHWP.

A letter from Robert Maling of the ONHWP dated April 6, 1983 to York Condominium Corporation #528 stated that there were two matters of major concern to York Condominium Corporation #528 still outstanding - water entry into balcony slab/wall, and efflorescence. The last paragraph stated "Mr.

Dade feels we are now sufficiently prepared to solve these matters and should High City Holdings fail to honour their warranty obligations, please be assured that the Warranty Program will do so in their stead". This surely indicates acceptance of responsibility to repair the balconies, as do other letters (please see Exhibit 24, page 8 of decision, Exhibit 25, page 9 and Exhibit 26, page 11, and as recently as January 23rd, 1984, a letter, Exhibit 52A).

> January 23, 1984 (Exhibit 52A)
>
> Mr. A.J. Nathaniels
> 30 Glen Elm Avenue
> Suite 108
> Toronto, Ontario
> M4T 1T7
>
> Dear Mr. Nathaniels:
>
> Re York Condominium Corporation No. 528
> Our file No. 10-8934-(61393)
>
> The drawing which accompanies this letter is the design of Mr. Tibor Pal and shows our proposed method of doing the balconies. While it will be an expensive and time consuming job we feel that over the long term it will be better than installing a top membrane.
>
> It will also eliminate water run-off onto the masonry walls, which has been a large part of the efflorescence problem and will also make it much easier to effect repairs, if required, over a long period of time.
>
> Thank you for your cooperation in allowing us to examine the exterior walls in your suite. It demonstrated that certain elements of vapor barrier are missing however, our evaluation of the condition is such that we cannot be sure to any degree the effects those conditions have had on the extremes of efflorescence on the exterior walls.

> It is therefore, our intention to carry on as soon as possible to work on the masonry by saw cutting, tuck pointing and replacement of brick where necessary, and upon completion of that action to caulk all areas as necessary.
>
> Once that is done, together with the balconies, the brickwork will be monitored to see if further steps are required should severe efflorescence recur.
>
> Yours truly,
>
> "Ray Dade"
> Ray Dade,
> Technical Representative
> Condominium Section.
> RD/lb

Mr. Nathanielsz, then President of York Condominium Corporation #528, acting as agent for the unit holders of York Condominium Corporation #528 (he signed claim forms Exhibit 36A, B, C and F) "A.J. Nathanielsz for York Condominium #528". This was in response to Mr. Maling's request that he send the claims to the ONHWP. On these forms he reported claims to the builder with copies to the ONHWP dating back to December 3, 1980.

The law governing this is found in Section 13(4) of the Ontario New Home Warranties Plan Act "Terms of Warranty under subs.(1)", and does not state that claims made in the first year after registration "die on the vine" because they were not settled then - there is no expiry date!

The ONHWP through its officers admitted problems of water penetration into the balconies and only changed their position when the builder disappeared leaving them an expensive repair problem. They defended their position by saying that the problem was caused by design, therefore the ONHWP was not responsible to repair it. If this were so, they should not have assured the unit owners that the ONHWP was going to recify the problems they were having with their balconies. By repairing the balconies of Miss Stubbs and Mr. Nathanielsz, and maybe Mr. Lambie, they set a precedent.

Since this problem was admittedly communicated to the ONHWP within the first year of registration, the ONHWP has a responsibility to repair the problem balconies to prevent further water penetration.

CONCLUSION

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act and pursuant to the above Majority Decision (as well as those elements of the dissenting opinion which conform with it) the Tribunal orders and directs the Respondent:

1. To repair or clean away, forthwith upon the release of this Order, the efflorescence upon the brickwork at the subject building where it has recurred severely and subsequently to the original work done to it heretofore by the Respondent in October, 1983. Such repair or cleaning is to be deemed the final settlement of the problem of efflorescence complained of pending any further order of the Tribunal or a Court of superior jurisdiction.

2. To repair, forthwith upon the release of this Order, a certain masonry crack, at the top (balcony) corner of the west end of the subject building, which said crack is apparently due to a lintel-related problem and has been referred to at Page 4, paragraph 5, of a certain letter of the Respondent's (signed by Robert Maling) dated December 19, 1984 and entered as Exhibit 40 to these proceedings. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by York Condominium Corporation No. 528. The appeal had not been concluded at the time of this publication.

KENNETH M. FAWCETT

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C. CHAIRMAN
KENNETH VAN HAMME, MEMBER
WILLIAM J. BINGLEY, MEMBER

COUNSEL: KENNETH M. FAWCETT, appearing in person

STEPHEN MARTIN, representing the Respondent

DATE OF
HEARING: 17 April 1985 Toronto

REASONS FOR DECISION AND ORDER

The Tribunal finds that, though during the relevant period the Appellant was not registered, his conduct is to be assessed as if he in fact was so registered.

The Tribunal finds that the Appellant acted as a real estate salesman in a trade with respect to a restaurant called "Viva Restaurant and Night Club" at 1910 Yonge Street.

The trade is evidenced by an Agreement of Purchase and Sale, Exhibit 12, dated the 11th day of April 1984, signed by Musella for the vendor and by the Appellant in the name of the purchaser, from whom he had a broad power of attorney.

The agreement stated:

> "The purchaser submits with this offer $10,000 certified cheque payable to purchaser's agent as a deposit to be held by him in trust pending completion or other termination of this agreement and to be credited towards the total purchase price on completion."

There was, in fact, in evidence a cheque for $10,000.00 made out by the purchaser properly to Montreal Trust Company of Canada "In Trust". The cheque was never deposited in the trust account maintained by Montreal Trust nor did the Appellant disclose the trade to his broker which had no knowledge of the transaction, nor a deposit related thereto.

The Appellant explains the failure to turn the cheque over to the broker for deposit by his belief that the cheque related to an offer dated the 4th day of April, 1984; and when that was not accepted, that that deposit no longer existed as such. However this was not conveyed to the vendor. Indeed, there had been a substantial discussion about the form of the deposit (in that it was somewhat unusual), the vendor acquiescing in the form.

The words of the April 11th agreement are clear in this respect as I have quoted. Either the Appellant had in fact reinstated the deposit cheque as such by virtue of his broad power of attorney, or he had misled the vendor as to the existence of the deposit. He should have either attended to the deposit of the cheque or made known to the vendor that there was no cheque. Many days passed; the purchaser went into the operation of the business in all aspects. The Appellant took no action with respect to the deposit, keeping it from the broker and not making known to the vendor the Appellant's view of the deposit, nor that he had not delivered the same to the broker for deposit within the regulation requirement time or otherwise.

The Tribunal need not reiterate at any length its reported views of the significance of the trust funds - as being the most basic, and perhaps most significant, aspect of the business regulated herein. The Tribunal finds that the Appellant's behaviour in respect thereof was not in accordance with the term "trust".

The Tribunal finds that the past conduct of the registrant affords reasonable grounds for belief that he will not carry on business in accordance with law, and with integrity and honesty.

Accordingly by virtue of the authority in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration.

GIOVANNI GIANNINI

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman
BARBARA SHAND, Member
DONALD MANCHESTER, Member

COUNSEL: DAVID IVEY, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 23 May 1985 Toronto

REASONS FOR DECISION AND ORDER

The Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, provides in Section 6(1)(b) that an applicant is entitled to registration [as a real estate salesperson] except where his or her past conduct affords reasonable grounds for belief that he or she will not carry on business in accordance with law and with integrity and honesty.

On July 30th, 1984, the Assistant Registrar of Real Estate and Business Brokers wrote to the Appellant a letter which begins as follows:

> Dear Mr. Giannini:
>
> We received your application for registration as a real estate salesperson last January. No action was taken since we understood that you appeared in court and were convicted on a charge of conspiracy to import counterfeit money.
>
> In view of the fact that you were in jail, we were unable to register you....

Subsequently the Registrar issued a Proposal to refuse the Appellant registration as a real estate salesman. The Proposal cites the above mentioned Section 6(1)(b) and the effect of the Appellant's past conduct upon the provision of law therein set forth.

At the time of the hearing the Appellant, as we were informed still under sentence of the Criminal Court, was on probation in respect to the balance of the sentence imposed upon him following the conviction referred to.

Particulars of the criminal offence, which was the subject of the conviction referred to in the letter quoted above, were provided to the Tribunal by Sgt. Martin of the fraud branch of the Hamilton Wentworth Police and these particulars contained in that witness's evidence (which the Tribunal accepts as fully truthful) disclose a criminal predispostion or propensity, a past record of dishonesty and lack of integrity, such as to convince the Tribunal that the applicant is quite unfit for registration in this industry or any industry in which honesty, integrity and the ability to carry on business in accordance with law and integrity and honesty are prerequisities.

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved. Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today, which is a very serious record of a sophisticated conspiracy with other criminals operating both in Canada and in the United States to illegally import a very large sum of counterfeit money into Canada for the motive of profit and, be it noted, at a time when the Appellant's prior registration as a real estate salesman, subsequently revoked, was in good standing. The crime in respect of which the Appellant was convicted and is still under sentence fully justifies the Registrar's Proposal to refuse registration which is a Proposal based on the Registrar's opinion of past conduct and which Proposal the Tribunal wholeheartedly upholds.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

RODNEY C. HARTH

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
REAL ESTATE AND BUSINESS BROKERS

TO REVOKE REGISTRATION

TRIBUNAL: MATTHEW SHEARD, Q.C., Vice-Chairman as Chairman
F. THOMAS PEOTTO, Member
JOHN W. PATERSON, Member

COUNSEL: TIMOTHY G. GOAD, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 24 June and 16 July 1985 Toronto

REASONS FOR DECISION AND ORDER

This was an appeal from a Proposal of the Registrar of Real Estate and Business Brokers to revoke the registration of the Appellant as a registered real estate salesman.

Section 8(2) of the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431 reads as follows:

> Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if he were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 6(1)(b) reads as follows:

> An applicant is entitled to registration or renewal of registration by the Registrar except where,
>
> ....
>
> (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty...

The Notice of Proposal over the signature of Alan Coleclough, Registrar of Real Estate and Business Brokers and dated at Toronto the 24th day of December, 1984, sets out the reasons for the Proposal, namely that:

> In my opinion, Harth's registration should be revoked as:
>
> (a) the past conduct of Harth affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The following Particulars were provided at the bottom of page 2 reading:

IT IS ALLEGED AS FOLLOWS:

1. Harth was first registered as a salesman under the Act on or about the 18th day of November, 1982, being employed at the Canada Trust Company, 415 Hespeller Road, Cambridge, Ontario (the "Company").

2. In or about the month of August, 1984, Harth became involved as a salesman in showing a property municipally known as 149 Cambridge Street, Cambridge, Ontario, (the "Property"), to Mrs. Joni Munns, a part-time receptionist employed by the Company.

3. On or about the 15th day of August, 1984, Mr. and Mrs. Munns attended at the Company whereupon Harth was requested to prepare an Offer to Purchase in the amount of $38,000, which offer was subsequently executed by Mr. and Mrs. Munns.

4. Harth subsequently presented the Offer to Purchase to the vendors, which offer was accepted.

5. Several days thereafter, Mrs. Joni Munns, acting on her husband's instructions, altered the original Agreement of Purchase and Sale,

contained in the office files of the Company, whereby the purchase price was altered to $39,000.

6. Immediately thereafter, Harth attended at the residence of Mr. and Mrs. Munns in order to assist them in the preparation of an application for Mortgage Loan (the "Application" with Montreal Trust, 101 Frederick Street, Kitchener, Ontario ("Montreal Trust"). For this purpose, a blank Application was provided by Harth.

7. At this point in time, Mr. Munns produced the altered Agreement of Purchase and Sale which was examined by Harth and used to complete the Application.

8. As a result, Harth completed, or assisted in the completion of, the Application which falsely represented the purchase price of the Property to be $39,000.

9. Upon completion of the Application, the Application plus the altered copy of the Agreement of Purchase and Sale was given to Harth by Mr. Munns with the instructions that the Application was to be submitted by Harth on behalf of Mr. and Mrs. Munns to Montreal Trust for loan approval.

10. The following morning Harth attended at the offices of Montreal Trust, whereupon he presented the altered Agreement of Purchase and Sale knowing it to have been altered and the application, knowing it to contain false information, to the mortgage manager for approval.

11. As a result of the false information provided to Montreal Trust, an Approval of Mortgage Loan was obtained by Mr. and Mrs. Munns with the condition that the loan was "subject to a sale price of no less than $39,000."

The Tribunal holds that the foregoing is a reasonably accurate recital of the facts.

At the hearing counsel for the Registrar summed up the evidence substantially as follows. On or about August 15th, 1984 Mr. Harth showed a residential property to Ernest and Joni Munns. As a result they instructed him to prepare an Offer for $38,000. This was executed by the Munns on the 15th day of August and presented to Mr. McTaggart and accepted on August 15th. There was a condition. The condition was that within 21 days the purchasers obtain a mortgage commitment for 90% of the purchase price. One night the Munns asked Mr. Harth to help them prepare a loan application. They produced an altered Agreement of Purchase and Sale showing a figure by way of purchase price of $39,000. They explained that they were having trouble obtaining funds. Mrs. Joni Munns explained how the altered form had come into being. She had, as an employee of the Real Estate firm with whom Mr. Harth was also employed, used a xerox copy machine and certain whiteout solution and the same typewriter which had been used to type out the original document, and prepared the altered document substantially as alleged in the Proposal hereinbefore referred to. Mrs. Munns testified that Mr. Harth then said that what they were proposing was wrong and that they could get into trouble. Without much coaxing however, he decided to go along with this fraudulent and improper scheme. He did not at once back out of the transaction as he ought to have done. Counsel for the Respondent further alleged that Mr. Harth agreed to be a co-conspirator in the attempted fraud upon the proposed mortgagee by uttering it to the latter knowing it to contain false information as to the purchase price.

Mr. Harth, according to his version of the events, said he decided to speak to his broker-manager, one Sherry Julius, before presenting the application to the proposed mortgagee and he claims she advised him "to go ahead" because "he wouldn't get caught". Diametrically opposed to this testimony was the testimony of Sherry Julius herself who has been with Canada Trust since 1979 and was the broker-manager of the Canada Trust office at the time in question. A past director of the Cambridge Real Estate Board and a past Chairman of their Ethics and Arbitration Committees, she stated quite emphatically that such a meeting never took place. The only time she ever spoke with him, she said, in connection with the 149 Cambridge Street property, was at a meeting to discuss whether Mr. Harth had "stolen" the Munns from another salesperson, Pat Buger. She said that he bragged that he was the "only one who could put the Munns deal together because of his skills at creative financing".

Other witnesses gave evidence which tended to attest that a meeting between Sherry Julius and Mr. Harth did take place. We can't be sure, however, what was said either by Mr. Harth or Sherry Julius at such meeting or meetings or why such meeting or meetings took place.

The final conclusion of the Ethics Committee is interesting and worthy of note. It is to be found at page 7 of the transcript of the hearing which was exhibited before the Tribunal as Ex. No. 10. It reads as follows:

> SUMMARY
> In the event of an appeal the ethics committee conclusions are as follows: Although Rod, we believe did approach his broker concerning the changes in the offer and mortgage application and was not given correct guidance by said broker but proceeded knowing it was wrong and the committee felt that the fine of $250 and that he be reprimanded for said doings.

The Tribunal in its assessment of the evidence in its totality is not at all sure that this man should be permitted to continue in this industry. We would be inclined to uphold the Registrar's Proposal to expel him from it were it not for the alleged complicity of his supervisor, the broker-manager Sherry Julius, in the wrongdoing which undoubtedly took place. But we feel that for one wrong to be punished and another not punished offends the basic concept of fair play. If Sherry Julius, the broker manager of the office in which the Appellant was engaged, was aware of the attempted fraud that was being proposed (and since she has not been on trial before us we are making no absolute finding of fact in this regard) her duty would have been to stop it. In the ultimate analysis of the evidence in this case the extent of the Appellant's culpability is not capable of precise measurement.

The Tribunal also finds that in assessing the Appellant's conduct his age and potential for reform, rehabilitation and improvement should be taken into consideration.

Section 9(4) of the Act reads in part as follows:

> Where an applicant or registrant requires a hearing by the Tribunal...the Tribunal...may by order direct the

> Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

In this case upon a due consideration of all the factors involved and of the evidence, the Tribunal feels that the past conduct of the applicant does not afford reasonable grounds for belief that he will not [in future] carry on business in accordance with law and with integrity and honesty. The Tribunal holds that the Registrar ought to refrain from carrying out his Proposal and the Tribunal Orders and Directs accordingly.

However, wrongdoing has occurred and a sanction, in the Tribunal's further opinion, is necessary by way of an assurance to the public and a warning to the industry at large that such wrongdoing will not be tolerated.

Therefore by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act the Tribunal directs the Registrar to refrain from carrying out his Proposal to revoke the Appellant's registration but instead to suspend the same for a period of two months commencing forthwith.

PETER KODIS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
DR. STUART E. ROSENBERG, MEMBER
SADIE MORANIS, MEMBER

COUNSEL: MARTIN KERBEL, representing the Appellant

STEPHEN AUSTIN, representing the Respondent

DATE OF
HEARING: 9 September 1985 Toronto

REASONS FOR DECISION AND ORDER

The Applicant has a history of employment as a registered real estate salesman from about the period the 13th May 1974 until about 5th June 1977 and has a record of applications during and after.

On or about the 12th February 1985, the Applicant filed a new application for registration under the Act. Upon a consideration of the same by the Registrar, the Registrar issued a Proposal to refuse to grant registration to the Appellant as a real estate salesman for two reasons:

> "In my opinion the Applicant is not entitled to registration under Section 6 of the Act as
>
> (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
>
> (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

The basic facts relating to the history of the registration and applications of the Appellant are set out in the Notice of Proposal. There is no dispute in respect of those items listed as convictions. Explanations have been given in respect of some of the facts relating to his salesman's employment by the Applicant.

On the 24th May 1974, the Applicant applied for registration under the Act. In his application the Applicant answered "Yes" to a question 6 therein which stated:

> "Have you ever been charged, indicted or convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

Particulars were given by the Applicant in respect of five convictions over a period from 1959 to 1970. The Applicant was registered as a salesman.

On or about the 1st October 1974, the Applicant filed with the Registrar a notice of change indicating he was transfering his employment from Munshaw Real Estate Ltd. to Canada Permanent Trust Company and the Applicant has given an explanation for the change. On May 10, 1976, the Applicant's employment with Canada Permanent Trust Company was terminated.

By an application dated the 16th June 1976 and filed on or about 22nd June 1976, for registration under the Act as a real estate salesman for Montreal Trust Company, the Applicant answered "Yes" to a question 9(a) on the question form:

> "Have you ever been convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

The Applicant did not list that there were pending charges related to possession of a stolen credit card in respect of which on 23rd June 1976 he was fined $150 or a period of incarceration for six weeks in default. It is to be noted that the note attached to the question is: "where the Applicant has been previously registered list only those convictions which occurred since the last filing. You are not required to disclose any convictions in respect of which pardon has been granted." However the question proper states, "If yes, give full particulars of all such convictions and proceedings."

In May of 1978 the Applicant made a further application for registration under the Act as a real estate salesman to be employed by the Montreal Trust Company. In the application for registration the Applicant answered "Yes" to question 9(a) therein which states:

> "Have you ever been convicted under any law of any country or state or province thereof, of a criminal offence or are there any proceedings now pending. If yes, give full particulars."

The Applicant failed to disclose in this application that he had since the earlier application had been finalized, been convicted of two criminal offences - one, June 23rd, 1976, respecting the possession of a stolen credit card and on the second, on August 9th, 1977, possession of stolen property over $200 for which he was sentenced for a four month period of incarceration.

It is to be noted that the Applicant had already earlier in 1974 filled out an application form in which he had given particulars of the convictions up to the time of that filing.

The application of February 12th, 1985 has a question 7 as set out in the Notice of Proposal and the Applicant answered "Yes" and listed 8 convictions. He omitted to list 3 convictions.

The first was with respect to failure to comply with conditions of recognizance for which he was sentenced to a period of incarceration of 30 days concurrently. An explanation given in respect of this omission was that it would have taken place concurrently with the conviction of the same date of living on avails of prostitution and that the two items might have been considered as being part of the same.

The second omission was in respect of a conviction on the 17th November 1983 for Personation for which the Applicant was sentenced to 1 day in jail plus a fine of $350 or a further 20 days in jail, in default. It has been submitted to this Tribunal that that is not an offence to which serious consideration should be given in the light of the explanation that was given, i.e. a visit to Florida to a son, and in that the penalty imposed was not all that severe. The Registrar has indicated that he has treated this omission as being a serious one; the Tribunal agrees with the Registrar for the act of personation has the element within it related to taking advantage in purporting to be other than what one is.

The third omission was in respect of a conviction on the 16 February 1984, possession of stolen property for which he was fined $800 or 6 months in jail, in default. The Tribunal notes that the rationalization of this omission because of another conviction at the same time does not have validity because of the 10 day gap, and in that the two offences were completely different and insofar as the Tribunal is aware, completely independent and unrelated to each other.

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

Accordingly the Tribunal is of the opinion that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal has considerable sympathy with the Applicant and the position he finds himself in. The Tribunal is aware of his resort to medical treatment which appears to have had favourable indications. The Tribunal is aware that there is a period of probation which has already been served and a period which has yet to be completed during which time his behaviour will be under scrutiny of another authority. The Tribunal does reiterate the section in the Act which has been referred to by counsel for the Registrar, section 10:

> "A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

Being aware of this provision, it may be that the Applicant may see fit to take such action after a period of time whereby such an application could in all propriety be placed before the Registrar for his consideration.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOHN NOEL WALTON

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE REGISTRATION

TRIBUNAL: MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN AS CHAIRMAN
F. THOMAS PEOTTO, MEMBER
WILLIAM BINGLEY, MEMBER

COUNSEL: JOHN RODENHURST, representing the Appellant

A.N. MAJAINA, representing the Respondent

DATES OF HEARING: 8 July and 22 August 1985 Toronto

REASONS FOR DECISION AND ORDER

This hearing is an appeal by John Noel Walton from a Notice of Proposal dated July 18th, 1983, by the Registrar of the Real Estate and Business Brokers Act wherein the Registrar seeks to revoke the registration of the Applicant for reasons that would disentitle the registrant to registration under section 6 of the Act if he were applying for registration. The Reasons of the Registrar are set out in the Proposal.

The first ground cited as a reason for revocation is that in view of the financial position of the Applicant, he cannot be expected to be financially responsible in the conduct of his business. The evidence called on behalf of the Registrar indicates that the Applicant was first registered as real estate salesman in 1978 notwithstanding his disclosure that there were several judgments outstanding against him. At the time of the registration, the Applicant indicated to the Registrar that he did not want to declare bankruptcy and that it was his intention either to have the judgments set aside by the various courts or to pay them in full. In his applications for renewal, Walton had declared that there were unpaid judgments recorded against him. However, he consistently neglected to respond to the Registrar's letters of February 9, 1981, March 27, 1981 and February 10, 1982 in respect of payment of such judgments.

On March 28, 1983, the Applicant, Mr. Walton, was interviewed by a Ministry investigator and that interview revealed an indebtedness of approximately $100,000.00

consisting of registered judgments, interest on such judgments and repayments owing of "drawings" to Simcoe Real Estate Ltd. There were discussions between the Ministry and the Applicant as to a notice of settlement to pay the debts; nothing materialized as to payment.

The current Registrar, Mr. Coleclough, testified with respect to his opinion of the Applicant's intention and ability to pay his debts. The Registrar indicated that he was continuously seeking evidence from the Applicant that he was serious about payment to his creditors but he could never find such evidence. The Registrar felt that Mr. Walton was dishonest in that he never does what he promises to do and is a perpetual "hard luck story". Mr. Coleclough drew the conclusion that Mr. Walton did not declare bankruptcy, not out of concern for his creditors, but out of concern as to his own ability to borrow.

In addition to Mr. Walton's history of financial difficulty, the Registrar became apprised of a real estate transaction which it alleges in the Proposal to revoke demonstrates Mr. Walton to be irresponsible and less than as honest as he is required to be in his real estate dealings. In 1981 Mr. Walton submitted an offer to purchase a property listed by his employer. At the time of the submission of the offer, the Applicant disclosed to the vendors that he was a real estate salesman and broker. The vendor accepted an unconditional offer by Walton. The transaction aborted on the closing date, and the McKendrys who had believed they had a firm and binding offer and had purchased another property on the security of their own "sale" obtained a judgment for damages. Mr. McKendry testified as to the hardship occasioned to him and his wife by Mr. Walton's conduct.

Testifying on his own behalf, Mr. Walton firstly drew attention to the fact that the substantial portion owing as to judgments was incurred in his previous career in patent work and a most unfortunate dealing with one particular client. He resolutely indicated to the Tribunal that he intended to make some satisfactory arrangement as to the payment of his debts, but he has been consistently thwarted by "bad luck" in the last few years. As to the McKendry transaction, the Applicant felt that it was only the unforeseen drop in the real estate market which made his speculation seem reckless. Mr. Lewis, the employer of the Applicant, tesifified that the Applicant was intelligent, hard working and reminded the Tribunal of the perpetual cash flow problems inherent in the real estate business. Evidence was also given as to Mr. Walton's earnings in the business and that evidence was not impressive.

Upon reviewing all the evidence, the Tribunal finds that Mr. Walton's financial ills are chronic. The Act which the Registrar administers clearly indicates that one is not entitled to registration or if registered, that such registration should not continue, if having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business. We feel that Mr. Coleclough is compelled to issue his Notice of Proposal in these circumstances and that since 1978 Mr. Walton had been treated very leniently by the Registrar. No more glaring example, however, can be given of Mr. Walton's situation leading to financial irresponsibility than Mr. Walton's behaviour toward the McKendrys.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs to Registrar to carry out his Proposal.

TRAVEL LINK INC.

APPEAL FROM A DECISION OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: STEPHANIE J. WYCHOWANEC, Q.C., CHAIRMAN
BARBARA J. SHAND, MEMBER
PETER BONCH, MEMBER

COUNSEL: A.N. MAJAINA, representing the Respondent

No one appearing for the Appellant

DATE OF HEARING: 26 September 1985 Toronto

REASONS FOR DECISION AND ORDER

On July 5, 1985, the Registrar, Travel Industry Act, (the "Registrar") pursuant to Sections 4 and 5(2) of the Travel Industry Act, R.S.O. 1980, c.509, (the "Act") issued and served a combined Notice of Proposal to Revoke Registration and Order of Immediate Temporary Suspension of Registration (the "Notice of Proposal") on Travel Link Incorporated ("Travel Link") a travel agent registered under the said Act, and on Donna Green, the owner and sole director, officer and shareholder of Travel Link.

The Registrar's proposal to revoke the registration of Travel Link was based essentially upon two grounds - the apparent financial instability of Travel Link and the past conduct of Donna Green in failing to comply with requests of the Registrar to provide financial statements and other documents as required under the Act. Details of both grounds were fully set out in the Notice of Proposal.

Upon receipt of the Notice of Proposal, Ms. Green, as provided for in the Act, requested a hearing before the Commercial Registration Appeal Tribunal (the "Tribunal"), and on July 17, 1985, an Appointment for and Notice of Hearing was issued advising Travel Link and Ms. Green that a hearing would be held pursuant to Section 6(4) of the Act before the Tribunal on July 19, 1985.

The Appointment contained the following Notice:

> "AND FURTHER TAKE NOTICE that, if you do not attend at the hearing, the Commercial Registration Appeal Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings."

On July 19th, at the request of Travel Link and on consent of the Registrar, the matter was adjourned to July 25, 1985.

On July 25th, neither Ms. Green, nor any other representative on behalf of Travel Link appeared. The Tribunal once again, after hearing submissions on behalf of the Registrar, adjourned the matter sine die and ordered that the Order of Interim Suspension be extended until the hearing was concluded.

By Appointment for and Notice of Adjourned Hearing dated September 12, 1985, a new hearing date of September 27, 1985 was set. Again no one appeared on behalf of Travel Link. The Tribunal decided that the matter should proceed in the absence of Travel Link and called upon counsel for the Registrar to present his case.

Three witnesses were called on behalf of the Registrar.

R. O. Steed, an inspector designated by the Registrar, gave evidence both as to the apparent working capital deficiency and his lengthy correspondence with Ms. Green requesting the financial statements of Travel Link and/or evidence of infusion of capital. Mr. Steed's first report showing a working capital deficiency of $18,372. and the conclusion that Travel Link "appears to pose threat to fund as at June 30/83", was dated December 23, 1983. A letter to Ms. Green dated October 1, 1984, stated that if the required financial statements were not received by October 31, 1984, Mr. Steed would request the Registrar to suspend the registration of Travel Link as a travel agent. Exhibits 19 and 20, dated October 1, 1984 and November 28, 1984 respectively, reported that the information previously demanded had not been received. Exhibit 20 stated that "the Registrar may wish to take further (sic) with this Registrant."

Mr. Steed could not unequivocally state what the financial position of Travel Link was at the time of the hearing because he had not seen any financial statements of that company subsequent to June 30, 1984. It was that unaudited statement which had shown the working capital deficiency previously referred to.

R. A. Baird, a financial officer of the Registrar, also gave evidence as to his unsuccessful attempts, which included numerous telephone calls and letters to obtain the financial statements from Travel Link and a meeting with Ms. Green.

Mr. Baird also prepared Exhibit 24 which was a file summary listing the telephone calls made to Ms. Green to set up a meeting to discuss the operation of Travel Link and a series of N.S.F. cheques issued by Travel Link to its suppliers of travel services, the first such cheque being dated June 25, 1984, the last dated June 10, 1985. These N.S.F. cheques were reported to the Registrar by the suppliers as required by the regulations under the Act.

None of the above evidence, given under oath, was challenged or refuted, and therefore must be taken as proven.

W. D. Smith, an investigator with the Investigation and Enforcement Branch of the Ministry of Consumer and Commercial Relations, gave evidence as to an alleged breach of the Immediate Temporary Suspension of Registration Order of the Registrar. In the Tribunal's opinion, the allegation was not proven and was not taken into account in reaching a decision.

The Tribunal finds that Travel Link and Donna Green have failed to provide the Registrar with financial statements and other statements relating to the current working assets and liabilities of Travel Link as required under the Act and regulations. The Tribunal also finds that the issuance of N.S.F. cheques and the apparent working capital deficiency is sufficient evidence at least to question the financial responsibility of Travel Link.

Ms. Green has not availed herself of the numerous opportunities given to her to discuss these problems with the officials in the Registrar's office prior to the suspension of the Travel Link certificate of registration. Nor has she appeared before this Tribunal to put forward her own position or to refute the allegations and conclusions drawn by the Registrar. Her flagrant disregard of the provisions of the Act and regulations, her repeated failure to answer letters and to attend meetings, arranged and rearranged to meet her convenience, show a pattern of, at best, irresponsibility, if not an outright determination not to provide pertinent information or comply with the law.

Section 4(1) of the Act reads in part as follows:

> "4.-(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,
>
> (c) the applicant is a corporation and,
>
> (ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
>
> (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;"

Section 5(2) of the Act reads:

> " (2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he were an applicant, or where the registrant is in breach of a term or condition of the registration."

Given the Tribunal's findings and conclusions and the provisions of the Act, the Tribunal is of the opinion that Travel Link and Donna Green cannot reasonably be expected to be financially responsible in the conduct of Travel Link's business and that the past and continuing conduct of Donna Green, as sole officer and director of Travel Link affords reasonable grounds for belief that the business of Travel Link will not be carried out in accordance with law and with integrity and honesty.

The Registrar's proposal is therefore upheld and the Tribunal, by virtue of the authority vested in it, orders and directs the Registrar to carry out his proposal to revoke the registration of Travel Link.

WAYNE R. BROWN et al
(as listed in Appendices "A","B", and "C"
to the Appointment for and Notice of Meeting)

IN RE: PROFESSIONAL SEMINAR CONSULTANTS LTD. and
ASSOCIATED BUILDING INDUSTRY OF NORTHERN CALIFORNIA,
MEDICAL SOCIETY OF SANTA BARBARA COUNTY and
ALAMEDA COUNTY DENTAL SOCIETY

MEETING TO DETERMINE, IN GENERAL, THE METHOD OF DISPOSITION OF CERTAIN ADJOURNED HEARINGS AND, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, IN PARTICULAR, TO CONSIDER THE CONTINUATION OF THE SAID HEARINGS IN WRITING

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, MEMBER
MARGARET DONALD, MEMBER

COUNSEL: SAMUEL R. RICKETT with JOHN B. HAMILTON, Q.C.
representing the Appellants

MICHAEL D. LIPTON, Q.C. with HOWARD GREENBERG
representing the Respondent

DATE OF
MEETING: 15 January 1985

Toronto

REASONS FOR RULING

The Tribunal finds that there is no absolute stated requirement that the hearing before the Commercial Registration Appeal Tribunal be "oral". To paraphrase Section 10 of the Statutory Powers Procedure Act, what is required is full and fair disclosure of the facts upon which the claim is based. Whatever method is used, the onus is upon the claimant to prove the claim.

There is no doubt that the Board of Trustees is as entitled to natural justice as is any claimant appearing before the Tribunal.

However, the Tribunal is unable to discern, upon a consideration of the total circumstances of these claims made, how the Board would be prejudiced by a continuance of the adjourned hearing in writing.

The Tribunal must also give consideration to the submission that insistence upon the personal appearance and testimony of claimants in the circumstances would have the effect of denying to the claimants the opportunity of presenting their claims for consideration by the Tribunal and in effect a review of the negative decision of the Board, i.e. denying to the claimant a "hearing".

The Tribunal has available to it in all the claims, the general evidence placed before it. It has the benefit of its own determination of fundamental issues which in all likelihood were of concern to the Board, and very effectively placed before the Tribunal by its counsel.

The reasons for the decisions made by the Tribunal in other claims indicate a format designated in part "sequential events' which relate to the particular facts of individual claims upon which the specific claims were dealt with.

The Tribunal rules that the hearing in the instance of one claimant out of each of Appendices "A" "B" and "C" (to be designated by counsel for the Appellants to the Registrar within 20 days hereof and to form part of this Ruling) be proceeded with by affidavit evidence and submissions in writing/orally by counsel, and that the remainder of the hearings be continued to be adjourned sine die to a date to be designated by the Registrar.

APPENDIX MARKED 'A'

TO THE RULING OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Wayne R. Brown
Mr. and Mrs. Karney Barberian
Kathie Botieff-Carniglia
Anita and William Botieff
Robert P. Bruce
Frances Finch
Edward and Alice Gabrielson
Mr. and Mrs. Gordon W. Hanson
Robert and Sarah Hall
Bruce G. Huntley
Walter Harrington and Alexander Kulakoff
Charles I. Joens
Fay G. Koretoff
Mr. and Mrs. Harold J. Kreutz
Lloyd and Elizabeth Klein
Elwood J. Leep
John and Jeane Lane
Bradford D. Melton
Lee Marsh
Byrl D. Phelps
Ned K. Ryder
Edward P. Schwafel Engineer Inc.
Mr. and Mrs. Willis G. Schoemaker
J. Boyd Stout
Walter and Zula Springs
Robert E. Towne
Carol Rexroth
James W. Williams
Jack Webb
Paul Baldacci, Jr.
Mr. and Mrs. Thomas J. Callan, Jr.
W. Edgar Jessup, Jr.
Paul and Edwina McDowell
Donald R. Wick

APPENDIX MARKED 'B'

TO THE RULING OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

John R. Almklov
Eugene Mironoff
Oscar Auerback
Benjamin B. Banaag
Harry B. Braun
Alfred V. Bateman
Dr. and Mrs. Stephen L. Bland
William Durnin
Mr. and Mrs. William J. Davenport
Joseph M. Farber
Rita Galligan
E. A. Hackie
Edward E. Hildebrand
Mrs. Letarcia G. Hunt
Nathan Jacobs
Donald E. King
Norton Kolomeyer
Mr. and Mrs. Harper C. Lowe
Lois L. Schwartz
Victor J. Slominski
Dr. and Mrs. Carl Leong
Robert C. Marshall
John D. Meschuk
Helen McClary
Robert M. du Roy
Marvin Rechter
William J. Tibbs
Frank S. Vigil
Frank E. Weagant

APPENDIX MARKED 'C'

TO THE RULING OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Stanley and Laverne Krotz
Dr. Russell R. Langenbeck
Dr. and Mrs. Dan W. Peterson

WENTWORTH CONDOMINIUM CORPORATION NO. 45

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MARY JANE BINKS RICE, Q.C., VICE-CHAIRMAN
D.H. MACFARLANE, MEMBER

COUNSEL: J.M. REESOR, representing the Appellant

BRIAN M. CAMPBELL, representing the Respondent

DATE OF
MEETING: 28 February 1985 Toronto

REASONS FOR RULING

Wentworth Condominium Corporation No. 45 made a claim for damages based on a breach of warranty because of a major structural defect.

This meeting of the Tribunal has become concerned with determination of a preliminary issue of whether the claim was barred by reason of the time of being made, i.e. after expiry of the warranty.

Relevant provisions respecting time as related to warranties are:

ONTARIO NEW HOME WARRANTIES PLAN ACT

Sec.1 "In this Act,

...

(i) 'prescribed' means prescribed by the regulations;"

Sec.13(3) "The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate."

Sec. 13(4) "A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed."

...

Sec. 14(1) "Where,

...

(c) "the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed."

Sec.15 "For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and *the warranties take effect on the date of the registration of the declaration and description*."

(emphasis throughout is Tribunal's)

Reg. 726, Part I
Sec. 1(h) "'date of possession' means the date on which the home is completed for possession by an owner as specified in the applicable certificate of completion and possession;

(i) "'date of registration' means the date on which the declaration and description required by the Condominium Act are registered in the proper land registry office in respect of a condominium project."

Reg. 726, Part II
Sec.2. 3(2)

> "In the case of any condominium project, the vendor shall similiarly complete and execute the form of certificate of completion and possession required by the Corporation for the common elements, setting forth the date of registration, identifying any surface defects in workmanship and materials in respect of the common elements accepted by the condominium corporation and listing any unfinished work required in connection with the common elements."

The Condominium was enrolled under the Ontario New Home Warranties Plan Act 1976.

On the 21st November 1977, the Ontario New Home Warranty Program was advised on the Program form, which reads (in part):

> "...
>
> "As soon as the Condominium Corporation is registered under the Condominium Act we require you to supply us with the following information; this is to ensure that the necessary Warranty Certificate is issued for the Common Elements.
>
> "1. Date of Registration: March 16, 1977
> [Date was inserted]
>
> "...
>
> "On registration the Certificate of Completion and Possession covering the Common Elements must be completed forthwith...."

A Certificate of Completion and Possession in respect of 'Common Elements' was filed.

On the face page, the Date of Possession particular is blank.

On the reverse,

'Builder Certificate' states (in part):

> "1. The home described on the face hereof is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to the completion of seasonal work and items of a minor nature more particularly described on the face hereof.
>
> "2. The Builder will grant possession of the home to the Purchaser(s) on such date of possession and the Warranty Certificate to be issued by HUDAC New Home Warranty Program will be effective from that date."

'Purchaser Certificate' states (in part):

> "1. The Purchaser(s) has/have inspected the home described on the face hereof and such home is substantially completed and is ready for possession by the Purchaser(s) on the date of possession indicated on the face hereof subject only to completion by the Builder of seasonal work and items of a minor nature more particularly described on the face hereof.
>
> "2. ...
>
> "3. The Purchaser(s) is/are aware that the home has the benefit of the warranties contained in a Warranty Certificate to be issued by HUDAC New Home Warranty Program effective the date of possession and

> accept(s) such warranties by way of supplement to and extension of any express written warranties, representations and conditions heretofore given by the Builder but in lieu of all other warranties, representations and conditions, express or implied, statutory or otherwise, including, without limitation, any implied warranty of quality or fitness, and covenant(s) and agree(s) to fulfill the obligations of the Purchaser(s) set forth in such Warranty Certificate."

Each certificate is dated December 20th, 1977.

The Certificate of Completion and Possession appears to be the same form as is used in respect of a home.

By letter of February 6th, 1978, Wentworth Condominum was advised:

> "...
>
> "Attached is your Warranty Certificate, showing that the commencement date of the 5 year warranty is December 20, 1977. This Certificate is an important document."

In the Warranty Certificate the only reference to date is in the particular:

"DATE OF POSSESSION DECEMBER 20, 1977 "
[Date was inserted by Program]

In fine print at right bottom of front page, there is stated:

> "B Where, pursuant to section 14 of the Act,
>
> "(a) ...
>
> "(b) the Owner suffers damage because of a major structural defect and the claim is made by written notice to the Corporation after expiration of

> the foregoing warranties and by the fifth anniversary of the date of possession,
>
> ..."

The Tribunal finds:

A. That the (mis)statements:

   (a) in the letter of February 6, 1978 that "the commencement date of the 5 year warranty is December 20, 1977" and

   (b) in the warranty certificate that the warranty can be the basis of a claim "by the fifth anniversary of the date of possession," (i.e. by December 20th, 1982)

are the responsibility of the Respondent.

B. That the Appellant relied on the statement and did not submit a claim until September 22nd, 1982, i.e. beyond 5 years after the date of registration (16 March 1982).

C. The Appellant suffered a detriment by being deprived of mailing a claim prior to the 5 years after the registration.

D. The Program induced the Applicant to believe that a claim could be filed by December 20, 1982.

The Program's position is set out in a letter dated the 6th day of December 1984:

> "...Section 15 of the Ontario New Home Warranties Plan Act states that the warranties (on common elements) take effect on the date of registration of the declaration and description. Therefore, the warranty covering the common elements of W.C.C.#45 commenced March 16, 1977, not December 20, 1977. Since the warranty covers valid Major Structural Defects for a five year period only, the warranty for W.C.C.#45 expired March 16, 1982, prior to the claim letter dated September 22, 1982 submitted...

> "Take notice therefore that the Warranty Program hereby further denies your claim on the grounds that it was not submitted within the proper time limits set by Section 14(1)(C) of the Ontario New Home Warranties Plan Act."

The Appellant's position in a letter of 21st day of December 1984 refers to:

> "....the warranty certificate issued by our program covering the common elements of the condominium corporation. This warranty expressly states that the commencement date of the five year warranty is December 20th, 1977. This warranty certificate was issued by your program based on the information that was available to it at the time."

and submits:

> "...it is legally binding and enforceable in accordance with the provisions of the Act. If a mistake was made by the program at that time...this is of little relevance."

The Appellant submits that the Respondent is estopped from reliance upon section 15 of the Act and is bound by the warranty as issued by it including the period thereof of 5 years from 20 December 1977 so that the claim was made within the life of the warranty and before the expiry.

In support the Appellant cites Robertson v. Minister of Pensions (1949) 1 K.B. 227 wherein a serving army officer, wrote to the Director of Personal Services at the War office regarding a disability of his and received a reply from the Director stating: "Your case has been duly considered and your disability has been accepted as attributable to military service". Neither the Minister of Pensions nor anyone in his department had been consulted. Relying on that assurance the officer forebore to obtain an independent medical opinion on his own behalf. The Minister of Pensions later decided that the appellant's disability was not attributable to war service.

The applicable Royal Warrant provided:

> "4. CONDITIONS FOR DISABILITY AWARDS. - A member of the military forces who is...certified to be disabled in consequence of a disability attributable to military service during the war, may be granted a disability award..."
>
> "2(4) 'Certified' shall mean....certified by a medical officer or board of medical officers appointed or recognized for the purposes by the Minister [of Pensions]."

It is noted that the certificate had not been made in accordance with the terms of the warrant; the Director had not been appointed or recognized by the Minister of Pensions.

Denning J. stated at page 231:

> "The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it is given then, once it is acted upon he is bound by it."

and

> "The next question is whether the assurance in the War Office letter is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded."

and at page 232:

> "In my opinion if a government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon it having the authority which it assumes. He does not know and cannot be expected to know the limits of its authority. The department itself is clearly bound...."

The Tribunal notes that in the Robertson case the certificate was held binding not only on the department issuing it but even beyond that - binding on another department, that specified in the Warrant.

The Program has relied on Maritime Electric Co. v. General Dairies Ltd. [1937] 1 D.L.R. 609 where it was held that where a statutory obligation of an unconditional character exists, estoppel is not allowed to defeat the obligation. A public utility company which, by mistake in computing the amount of electricity supplied to a consumer, charged and collected less than the rate it was authorized to make and exact under the Public Utilities Act may recover the amount of the undercharge even though the consumer acting upon the said statements so rendered believing the same to be true had adjusted the cost of his product (downward) and paid out to the farmers and others large sums of money more than they would or could have paid if the amounts claimed for electric energy had been rendered to and claimed at the several times when the said statements were rendered.

Section 16 of the Public Utilities Act provided:

> "No public utility shall charge, demand, collect or receive....less compensation for any service than is prescribed."

and such charge was prohibited by section 8 of that Act;

Section 19 provided that:

> "...no person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service...whereby any such service is by any device whatsoever, or otherwise, rendered...at a less rate than that named in the schedules in force as provided herein...."

Lord Maugham stated at page 613:

> "The specific question for determination here is can the duty so cast by statute upon both parties to this action be defeated or avoided by a mere mistake....

> In the view of their Lordships the answer to this question in the case of such a statute as is now under consideration must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships do not propose to express any opinions as to the statutes which are not within this category - where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, [i.e. recover back charges] it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence, which under certain special circumstances can be invoked by a party to an action; it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case estoppel is not precluded, since if it is admitted, the statute is not evaded, appears to their Lordships with respect to approach the problem from the wrong direction; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision."

The Program further relied upon The Queen in Right of Ontario v. Baig 23 O.R.(2d) 730 where the Crown was held entitled to recover from a person not eligible under provisions of the Statute, a statutory grant provided for in the Ontario Home Buyers Grant Act. This grant was paid under the mistaken impression that the recipient was both qualified and entitled to receive it. The basis of the receipt of the grant was the completion of a form sent by the Crown open to interpretation that the recipient was entitled. The form had in part a particularizing which led the recipient to a belief that he was entitled to the grant even though he was disentitled by the generalization in the same form which was in the words of the statute.

The Tribunal notes that in this case FitzGerald, D.C.J. found (p.733):

> "...no detriment suffered such as is required to bring the doctrine of estoppel into operation."

In respect of estoppel the Judge said:

> "...the respondent is faced with the fundamental principle that estoppel does not operate against the Crown."

He did set out the difference:

> "While there is a modern reluctance to let the Royal prerogative mask obvious injustice and to protect the weak from the power of the Crown, this tendency seems to have been confined to cases where the Crown was an actual participant in the conduct which induced the person affected to change his position to his detriment."

He accepted as:

> "One of the leading examples of estoppel operating against the Crown is the English case Robertson v. Minister of Pensions..."

[The headnote states that the Judge distinguished that case.]

It is to be noted that in Maritime Electric Co. v. General Dairies Ltd. and in The Queen in Right of Ontario v. Baig, and in Re: Harris and Ministry of Community and Social Services 1975 (O.R.) 2nd (referred to therein) there was in question the recovery of money to which there was no entitlement and an obligation (on the part of the authority) to recover.

In this matter to uphold the position of the Program would be depriving/nullifying that to which the Appellant was entitled, though it was faultless, to its detriment.

The Tribunal is of the opinion that the facts herein fall squarely within the principles enunciated in Robertson v. Minister of Pensions.

The Tribunal rules that the Respondent is estopped from relying upon section 15 of the Act, and from maintaining that the warranty had expired when the claim was made.

The Tribunal rules that the claim is not barred by reason of not having been made prior to March 16, 1982 and that the warranty was still valid and in effect when the claim was made.

* Note: The above ruling was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal had not been concluded at the time of this publication.

YORK CONDOMINIUM NO. 297

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR, MEMBER
D.H. MACFARLANE, MEMBER

COUNSEL: B. BARUCH SOOKMAN, representing the Appellant

BRIAN CAMPBELL, representing the Respondent

DATE OF HEARING: 26 November 1984 Toronto

REASONS FOR RULING

The Appellant, York Condominium No. 297 has brought an appeal from the Respondent's decision which was set out in its decision letter to be found in Exhibit 5 at Tab 4. The decision was that certain problems in respect of which relief was sought were not warranted in that they were not major structural defects. A major structural defect as defined would have been a defect in workmanship or materials and the alleged defect or defects in question were deemed to have been design defects and therefore not covered. That was the decision from which the Appellant appealed.

However, at the hearing counsel for the Respondent advanced an initial objection that the warranty provided by the Statute did not exist in the case of the Appellant and that the reasons given in the decision letter were therefore irrelevant.

It was that objection by counsel for the Respondent to which the Appellant took issue and to which the Tribunal's deliberations at this hearing have been addressed.

The Tribunal is satisfied that the Ontario New Home Warranty Plan Act came into force and took effect upon December 31st, 1976. In this case the condominium corporation which is the Appellant was registered (in accordance with the proper provisions of law) on December 30th, 1976 - one day earlier.

The Tribunal holds that the Ontario New Home Warranties Plan Act is not retroactive in its application and that, notwithstanding a splendidly constructed argument to the contrary advanced on behalf of the Appellant, it therefore did not apply to the benefit of the Appellant who therefore had no status to seek relief pursuant to it.

The Statute provides for the making of by-laws whereby warranties in addition to those provided by it may be specified.

In this case the Appellant was asserting a claim or claims relating to the common elements of the condominium. Such common elements are deemed to belong to the condominium corporation rather than the owner or owners of any individual condominium dwelling unit.

But the Appellant, the condominium corporation, is not covered by the warranty provided by the Statute. This is because it has never taken the prescribed steps to avail itself of the benefit of such warranty, the same being bestowed in the finding of this Tribunal at By-law 16(2) of Regulation 726 under the Ontario New Home Warranties Plan Act which sets out what are called Transitional Rules and which reads as follows:

> (2) Any vendor may, at his option, apply to the Registrar pursuant to the provisions of section 8 for enrolment in the Plan of the common elements of any condominium project that includes unsold homes and the date of registration for which has occurred prior to the 31st day of December, 1976.

The Tribunal holds that compliance with the said By-law would have been the only means whereby the Appellant could have gained or attained the necessary status to succeed in its appeal or even to bring the same before this Tribunal.

The Tribunal adopts the reasons set out in its former decision in the case of Re: Halton Condominium Corporation #41 (1982) 11 C.R.A.T. p.104, insofar as they apply to this case which they do in substantial measure.

Accordingly by virtue of the general authority vested in it, the Tribunal rules that there is no entitlement by the Appellant to a hearing under Section 16(2) of the Act.